Supreme Court, U.S.
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No. 02-1192

IN THE
Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether a responsible party may bring an action for contribution under section 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f), in the absence of a prior or pending federal civil action brought under sections 106 or 107 of CERCLA.

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STATEMENT OF THE CASE

A. Statutory Background.

The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601-9675 (2000), ("CERCLA" or "Act"), enacted in 1980, addresses the problem of real property contaminated by hazardous substances. The Act provides the federal government with powerful mechanisms to ensure the clean-up of such properties. First, § 104, 42 U.S.C. § 9604, authorizes the federal government to undertake response actions itself. Those actions may be financed by a federal fund, known originally as the Hazardous Substances Superfund, 42 U.S.C. § 9611, and the federal government may sue a broad class of "potentially responsible parties" to recoup its "response costs," 42 U.S.C. § 9607(a)(4)(A). Second, Congress gave the federal government the authority to compel private parties to undertake response actions themselves. Under § 106(a), 42 U.S.C. § 9606(a), the government may initiate a civil action in federal district court to compel a clean-up, or, alternatively, may issue an administrative order compelling a clean-up.

Congress also authorized private parties to recover their own response costs. Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), provides a federal cause of action that allows "any other person" who undertakes a response action to recover costs from any entity potentially responsible for the contamination (often referred to as a "potentially responsible party," or "PRP").

1. In the years immediately following CERCLA's adoption, there was considerable litigation to define the contours of the Act. By 1986, however, at least one principle was well-established: § 107 provided PRPs who undertook voluntary clean-ups with a cause of action against other PRPs who had contributed to the contamination. The fact that the suing entity was itself a PRP did not take it outside the scope of § 107. *See, e.g., City of Philadelphia v. Stepan Chem.*

Co., 544 F. Supp. 1135 (E.D. Pa. 1982); *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984); *Pinole Point Props., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290 (N.D. Cal. 1985). Nor – most important here – did it matter that a PRP acted voluntarily in cleaning up a site; government involvement in private clean-ups was not required before a PRP could recover under § 107. *See, e.g., Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (allowing cost recovery by PRP in the absence of any government order or lawsuit); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987) (PRP who "voluntarily pays CERCLA response costs" may bring action for cost recovery); *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348 (D. Del. 1985).

A question remained regarding the mechanism for apportioning costs among PRPs. Under § 107, each PRP was potentially liable for the entire cost of a clean-up, under "joint and several liability" principles. *See, e.g., United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983). To allow for a more equitable apportionment of costs, a series of court opinions held that CERCLA contained an implied right to contribution, to be developed pursuant to a uniform, federal common law. *See Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27 (E.D. Mo. 1985); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).[1] Reviewing this history, the Court stated:

> In its original form CERCLA contained no express provision authorizing a private party that incurred cleanup costs to seek contribution from other potentially responsible parties. In numerous cases, however, district courts interpreted the statute – particularly the § 107 provisions outlining the liabilities and defenses of persons against whom the government may assert claims – to impliedly authorize such a cause of action.

[1] Some courts found the right of contribution arose from federal common law. *See, e.g., Artesian Water Co. v. New Castle County*, 642 F. Supp. 1258, 1265-68 (D. Del. 1986). Other courts found an implied right of contribution in § 107 of CERCLA. *Wehner*, 616 F. Supp. at 31. This latter view was apparently the position of the Department of Justice. *Id.*

> cleanup costs to seek contribution from other potentially responsible parties. In numerous cases, however, district courts interpreted the statute – particularly the § 107 provisions outlining the liabilities and defenses of persons against whom the government may assert claims – to impliedly authorize such a cause of action.

Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994) (footnote omitted).

2. Due in part to this Court's decisions in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and *Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77 (1981), concerns arose about the authority of federal courts to find an implied cause of action in a federal statute such as CERCLA. Congress responded by amending CERCLA to provide for an express right of contribution. In the 1986 Superfund Amendment and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986) ("SARA"), Congress provided:

> Any person may seek contribution from any other person who is liable or potentially liable under [§107(a)] of this title, during or following any civil action under [§106] of this title or under [§107(a)] of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§106] of this title or [§107] of this title.

42 U.S.C. § 9613(f)(1) (2000). Congress also expressly authorized a right of contribution following "an administrative or judicially approved settlement" with the EPA. *Id.* at § 9613(f)(3)(B).

The legislative history on § 113(f) is limited. It acknowledges both the growing body of case law finding an implied right of contribution and the uncertainty regarding federal courts' authority to establish such implied rights. The legislative history also indicates that the purpose of section 113(f) was to "clarify" and "confirm" the right of contribution that existed prior to the adoption of SARA. H.R. Rep. No. 99-253, pt. I, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861.

3. As amended by SARA, CERCLA contained both the original cause of action for contribution established by § 107 and the express right of contribution recognized by § 113(f). *See Key Tronic*, 511 U.S. at 816 (describing "similar and somewhat overlapping remedies"). Courts were thus required to "allocate" the cause of action available to PRPs between the two sections: were PRPs seeking cost recovery from other PRPs entitled to sue under § 107, under § 113, or both?

The answer was important for two principal reasons. First, allocation of the cause of action would have implications for PRPs who settle with the government. Under § 113(f)(2), a settling party receives protection from actions for "contribution" by non-settling PRPs, intended to provide an incentive to settle with the government. If PRPs could bring an independent claim under § 107, then the contribution protection offered by § 113 would be rendered largely meaningless. *See United Techs. Corp. v. Browning-Ferris*, 33 F.3d 96, 102 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *United States v. Colorado & E.R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995). Even more fundamentally, the degree

to which PRPs may recover could be different under the two sections. Courts were concerned that a § 107 cause of action would entitle PRPs to a full recovery of all of their response costs, under joint and several liability rules, rather than to the equitable share provided for by § 113. *See, e.g., New Castle Co. v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121-22 (3d Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

Without exception, the federal courts of appeal resolved the "allocation" issue in favor of § 113, holding that PRPs may sue each other for apportionment of costs under § 113 and only under § 113.[2] The reasoning of the courts was as uniform as the result: PRPs must sue for "contribution" under § 113 because the very nature of their claim, one for an equitable allocation of costs among jointly liable parties, is inherently or quintessentially a claim for contribution. The end result was a uniform and clear structure for private cost-recovery claims under CERCLA. Non-PRPs – "innocent" landowners who did not contribute to contamination on their property – could sue for full cost recovery under § 107. But parties who were in part responsible for contamination – PRPs – were limited to actions for contribution under § 113, where they would benefit from "contribution protection" if they settled with the government but recover only an equitable portion of their response costs.

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[2] *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-25 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.), *cert. denied*, 525 U.S. 963 (1998); *Pinal Creek Group*, 118 F.3d at 1301; *New Castle County*, 111 F.3d at 1121-23; *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Colorado & E.R.R.*, 50 F.3d at 1534-36; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

B. Factual Background and Proceedings Below.

This case is about the right of a property owner, respondent Aviall Services, Inc. ("Aviall"), to recover an equitable share of its clean-up costs from the property's prior owner, petitioner Cooper Industries, Inc. ("Cooper"). As outlined above, actions such as this one have been brought routinely in the many years since CERCLA was adopted. And the settled right of a PRP to seek contribution from another PRP was the background against which the transaction in this case was undertaken.

1. Petitioner Cooper owned and operated several aircraft engine maintenance facilities in Texas. During the time Cooper operated the property, petroleum and other hazardous substances were released into the soil and groundwater. In 1981 Cooper sold the facilities to Aviall, which operated the facilities until it sold them in the mid-1990s. While Aviall owned the property, petroleum and hazardous substances apparently continued to leak into the soil and groundwater through underground storage tanks and spills.

Aviall discovered hazardous substances in the soil and groundwater on several occasions during the early 1990s. Each time, Aviall reported the discovery to the Texas environmental regulatory agency as required by Texas law. The State of Texas directed Aviall to clean up the properties, under threat of issuing an administrative order, and Aviall did so under the State's supervision.[3] Aviall has spent in excess of five million dollars to conduct its investigation and remediation activities.

[3] *See* R. 144-49, 1454-55, 1462-64, 1496-97, 1505-06, 1522-23. Petitioner's description of Aviall's activities as "voluntary" ignores the role the State played in compelling the clean-up.

2. In August 1997 Aviall filed this action against Cooper in the United States District Court for the Northern District of Texas, seeking to recover the share of its clean-up costs fairly charged to Cooper. J.A. 8A. In its original complaint, Aviall sought recovery of its costs under several causes of action, including § 107 and § 113 of CERCLA. J.A. 16A. Aviall later amended its complaint to add new state law claims, drop several common law claims, and combine its CERCLA claims into one, joint claim. J.A. 41A.[4]

Both parties filed motions for summary judgment. The district court granted Cooper's motion. The court read § 113 to allow an action for contribution only during or after a civil action under CERCLA. Pet. App. 90a. Because Aviall's clean-up was not undertaken pursuant to a CERCLA suit, the court reasoned, Aviall could not maintain its contribution action. *Id.* at 97a. A divided panel of the Fifth Circuit affirmed, on substantially the same reasoning. *Id.* at 47a.

3. On rehearing, the *en banc* court reversed and held that Aviall could pursue its contribution action. Pet. App. 9a. In an opinion written by Judge Edith Jones, the Court of Appeals held that § 113, which provides that a party "may" seek contribution during or following any civil action, does not by its terms preclude a contribution action in other circumstances. Rather, use of the permissive "may" reflects congressional intent to permit contribution actions in the absence of civil suits. *Id.* at 24a. Similarly, § 113's "savings clause," which provides expressly that "nothing in this sub-

[4] Despite certain references in the district court opinion and the arguments of petitioner, Aviall never abandoned its § 107 claim. J.A. 92A – 94A. Aviall framed its claim in the manner compelled by the Fifth Circuit's decision in *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000), *cert. denied*, 533 U.S. 950 (2001), which interpreted a PRP's cost-recovery action as arising jointly through the operation of sections 107 and 113.

section shall diminish the right of any person to bring an action for contribution in the absence of a civil action" under CERCLA, indicates that Congress did not intend to foreclose contribution actions brought by parties who have undertaken clean-ups without first litigating the issue. *Id.* at 25a. Finally, the Court of Appeals noted that its construction of § 113 was consistent with the purposes underlying CERCLA as a whole, in that it would "promote prompt and efficient cleanup of hazardous waste sites and the sharing of financial responsibility among the parties whose actions created the hazards." *Id.* at 14a.

SUMMARY OF ARGUMENT

For the past twenty five years, CERCLA has been a central component of this nation's approach to the clean-up of contaminated property. Business arrangements and real estate transactions have been fashioned around a uniform understanding of CERCLA – an understanding that, regardless of the vagaries of state law, CERCLA establishes a cause of action for cost recovery by parties who undertake clean-ups – whether they do so voluntarily, under state or federal order, or following settlement with the government. That has been the position of the federal courts of appeals, and the understanding underlying countless business transactions.

Now, a quarter century after enactment of CERCLA and almost eighteen years after adoption of the provision at issue in this case, petitioner urges upon the Court a brand new reading of CERCLA. Under petitioner's view, § 113 precludes a right of contribution by a PRP who either voluntarily or in response to a state or federal order cleans up contaminated property. Indeed, petitioner goes one step further than that: such PRPs are not only foreclosed from recovering under § 113 but are also left without any right to cost recovery under CERCLA. That novel position is not supported by the language, legislative history, or structure of the

Act. Adoption of petitioner's position would disrupt the most basic and settled understanding of the operation of CERCLA.

1. Section 113 expressly authorizes a right of action for "contribution." As the courts of appeals have uniformly held, an action by a PRP who cleans up contaminated property – whether voluntarily, under government direction, or pursuant to litigation – and seeks partial recovery from another PRP is a "quintessential" claim for contribution and thus falls squarely within § 113. Were it otherwise, there would be no basis for what is now the well-settled proposition that PRPs must sue for contribution under § 113 rather than seeking recovery under § 107.

By its terms, § 113 permits actions by PRPs who conduct clean-ups voluntarily or pursuant to administrative order. Though Congress specified certain common situations in which a contribution action can be expected – during or after CERCLA litigation – it also expressly stated that the right to bring an action at other times was not curtailed. The straightforward reading adopted by the court below simply takes Congress at its word.

Petitioner's contrary reading, on the other hand, requires significant alteration of the statutory language. "May" becomes "may only," and the savings clause is rewritten to apply only to state law – which would itself pose difficult and, for this Court, novel questions of CERCLA preemption. Petitioner's reading is also contrary to the long-standing position of the Department of Justice ("DOJ" or "Justice"). Despite the fact that the Solicitor General has entered this case as *amicus* in support of petitioner, DOJ in the past has read the statute just as respondent and the Fifth Circuit do: use of the permissive "may" in the first sentence, combined with the savings clause in the last, make clear that a PRP may sue

for contribution whether or not the clean-up was the subject of CERCLA litigation.

2. Petitioner's reading of § 113 is inconsistent with the congressional purpose behind CERCLA. Through CERCLA, Congress intended to encourage voluntary clean-ups of contaminated properties. But on petitioner's reading, PRPs have a decided *disincentive* to act voluntarily: only if they resist voluntary action and provoke court action can they recover any of their costs from entities partially responsible for the contamination. Petitioner's position also would effectively immunize responsible parties from any liability for their equitable share of costs once some other PRP had voluntarily cleaned up a site, contrary to Congress' intent. Finally, petitioner's arguments are utterly inconsistent with one of the main purposes of CERCLA: to establish a uniform, national policy of liability.

Petitioner's reading also runs contrary to decades of settled case law, finding a cause of action for contribution under CERCLA for PRPs who have engaged in clean-ups either voluntarily or at the direction of administrative orders, and is in tension with regulations of the Environmental Protection Agency. And as noted above, it conflicts with the traditional position of DOJ. All of these authorities have generated settled expectations in the business community that would be badly undermined were the Court to adopt petitioner's novel theory.

3. If this Court were to hold that respondent has no cause of action under § 113, then the Court should remand to allow respondent to proceed under its § 107 claim. There is no merit to petitioner's contention that Aviall has somehow waived that claim. And if respondent is correct that PRPs like Aviall cannot bring an action for contribution under § 113, then it follows that those PRPs are entitled to recover under § 107 instead.

ARGUMENT

Petitioner's argument – that CERCLA precludes recovery of an equitable share of costs by a PRP who cleans up contaminated property either voluntarily or pursuant to an administrative order – is virtually unprecedented. No federal court of appeals has ever adopted that position – with the exception of the Fifth Circuit panel below, which was of course promptly reversed by the *en banc* court of appeals. Indeed, this case is the first in which a court of appeals has even *addressed* petitioner's novel position. As demonstrated by the numerous amicus briefs filed in this case, on behalf of parties ranging from the American Petroleum Institute to the State of New York to environmental organizations, petitioner's argument is not only incorrect but also deeply destructive to the system for assigning liability under CERCLA that has been well-established and smoothly functioning in the lower courts for years.

I. CERCLA § 113 AUTHORIZES RESPONDENT TO SEEK CONTRIBUTION.

A. Respondent's Claim Is A Quintessential Claim For Contribution.

Section 113 expressly authorizes parties to seek "contribution" from other liable parties. That is exactly what respondent Aviall is doing here. One jointly liable party, who has properly cleaned up contaminated property under state compulsion, is seeking an equitable allocation of costs with another jointly liable party. That scenario satisfies the common understanding of "contribution" – the understanding that has led the courts of appeals to hold uniformly that PRPs may sue under § 113's "contribution" action and *only* under § 113, rather than seeking full cost recovery under § 107.

1. This Court defined the essential elements of a claim for contribution in *Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77, 87-88 (1981):

> Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability. Recognition of the right reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.

The situation described by the Court is precisely the circumstance that exists when one PRP, jointly and severally liable with other PRPs, cleans up property and seeks to share the cost with another jointly liable party.

Contrary to petitioner's argument, a formal court adjudication of liability is not a prerequisite to an action for contribution at common law. Rather, a claim for contribution by a PRP in the absence of a judgment or settlement is consistent with general tort principles. The Restatement (Second) Of Torts addresses the issue directly, clarifying that "when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, *even though judgment has not been recovered against all or any of them*." RESTATEMENT (SECOND) OF TORTS § 886A (1979) (emphasis added); *see also id.* at cmt. b ("the rule stated applies . . . in favor of a tortfeasor who has paid more than his equitable share . . . without any judgment or even suit against him"). Other authorities, though less explicit, also suggest that a claim for contribution may proceed without a judgment or settlement. *See* BLACK'S LAW

DICTIONARY 329 (7th ed. 1999) (defining "contribution" as a "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share"); Uniform Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996) ("right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability").

Indeed, the Department of Justice has in the past taken the position that a right to contribution may accrue in the absence of a formal adjudication of liability. In its brief in *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998) ("*Centerior* Br."),[5] the Department explained:

> Every circuit court deciding this issue has held that CERCLA suits among PRPs are in the nature of an action for contribution, regardless of how the action is labeled. That plaintiffs have not formally admitted liability or otherwise been adjudged liable does not alter the conclusion that plaintiffs are limited to a contribution action.

Centerior Br., App. 8A. And in a brief to this Court opposing certiorari in *Pinal Creek Group v. Newmont Mining Co.*, 524 U.S. 937 (1998), the Solicitor General argued that a PRP who voluntarily cleaned up property could sue in contribution under § 113, and relied on the uniform circuit court authority holding that such actions by PRPs are inherently actions for contribution. Brief for the United States as Amicus Curiae (*Pinal* Br.), 1998 WL 34103033 at *7, *15.[6]

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[5] Because the *Centerior* Brief is not readily available on line, a copy is attached to this brief as an Appendix ("App").

[6] In its amicus brief in this case, the Solicitor General does not discuss what appears to be a fairly substantial change in position, beyond a single and rather cryptic reference to the possibility of "errant" language in

2. The federal courts of appeals have universally held that an action by one PRP against another to recover clean-up costs under CERCLA is a "quintessential" claim for contribution. *See Bedford Affiliates*, 156 F.3d at 423-24 (claim by PRP to recoup portion of costs exceeding its equitable share of overall liability is "quintessential claim for contribution").[7] That authority includes cases in which the PRP in question had engaged in wholly *voluntary* clean-up activities. *See Pinal Creek Group*, 118 F.3d at 1298; *Control Data Corp. v. S.C.S.C. Corp.*, 53 F. 3d 930, 932 (8th Cir. 1995); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989).

As discussed earlier, those cases go on to hold that because any claim by one PRP against another is necessarily a "contribution" claim, PRPs not only *may* sue under § 113, but indeed *must* sue under § 113 instead of under § 107's cost-recovery provisions. Petitioner's position (and the current position of the Solicitor General) is of course inconsistent with that consensus view: if a right to contribution does

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earlier DOJ briefs. Brief for the United States as Amicus Curiae Supporting Petitioner ("SG Br.") at 26. When it asked for examples, respondent was advised that the Solicitor General was aware of no specific case in which the Department had taken a contrary position or used "errant" language.

[7] *See also Centerior Serv. Co.*, 153 F.3d at 349; *United Techs. Corp. Inc.*, 33 F.3d at 101 (responsible parties seeking recovery of portion of their response costs from other responsible parties were seeking contribution within the common understanding of the term); *Redwing Carriers, Inc. v.*, 94 F.3d at 1496 (claim by a PRP is a claim for contribution); *Akzo Coatings Inc.*, 30 F.3d at 764 (precluding PRP from seeking cost recovery claim and noting that action in which party liable for some of the site contamination sought costs from other liable parties is a "quintessential claim for contribution"); *In re Reading Co.*, 115 F.3d 1111, 1121 (3d Cir. 1997) (to the extent the aim of action is cost recovery by one PRP from another, it is an action for contribution).

not exist in the absence of a lawsuit or settlement, then at least as to a significant subset of PRPs, there is no longer any rationale for insisting that they sue under § 113 and for thus *precluding* suits under § 107. If adopted, petitioner's argument would disrupt the established view of the relationship between sections 107 and 113 and necessarily revive an independent claim by PRPs under § 107.

3. The contrary authorities cited by petitioner and the Solicitor General, Pet. Br. at 16-17, SG Br. at 17-19, suggest, at most, that a common law right of contribution might not exist following a wholly gratuitous payment which does not discharge or extinguish the underlying liability of a joint tortfeasor. Under those circumstances, it is argued, the joint tortfeasor against whom contribution is sought might be subject to double liability. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, § 23 cmt. b (if initial payment by party seeking contribution has not discharged liability of joint tortfeasor, "the person against whom contribution is sought would be subject to double liability") (cited in SG Br. at 18). But even if that were so, it would not support petitioner's position in this particular case, or foreclose an action for contribution by Aviall.

First, petitioner's position is that § 113 precludes actions for contribution by PRPs, like Aviall, who clean up property in response to state or federal orders. Such clean-ups cannot in any sense be seen as gratuitous; rather, they are undertaken under compulsion. Indeed, no clean-up by a PRP should be seen as purely voluntary or gratuitous because, even in the absence of an order, a PRP by definition exists under a cloud of potential liability.

Second and more importantly, a clean-up by a PRP, whether voluntary or in response to a government order, does effectively extinguish the underlying liability of other PRPs with respect to that clean-up. The fear of additional or

"double" liability arises only if the initial clean-up is inadequate, so that the government must insist on additional clean-up activities (or undertake them itself and then seek reimbursement). But with limited exceptions, privately expended clean-up costs qualify as recoverable damages only if they are consistent with the National Contingency Plan ("NCP"), 42 U.S.C. § 9607(a)(4)(B), which requires that private parties satisfy procedural and substantive requirements to produce a "CERCLA-quality cleanup," 40 C.F.R. § 300.700(c)(3)(i) (2003). As a result, cases in which PRPs may seek recovery of costs necessarily involve clean-ups that are of "CERCLA-quality" and entirely adequate, giving the government no reason to impose additional obligations on anyone.[8]

The Department of Justice has argued in the past that a clean-up in response to a government order "discharges" liability and thus justifies contribution. *Centerior* Br., App. 33A-35A.. But under the carefully worked out NCP system, the result is the same whenever a private party conducts a clean-up that is substantially consistent with the NCP.

B. The Text of Section 113 Permits An Action For Contribution By PRPs Like Aviall.

If, as uniformly held by the courts of appeals, an action by a PRP is inherently an action for contribution, then the only remaining issue is whether Congress intended, through the language of § 113(f)(1), to restrict the rights of PRPs to seek contribution – to make the right to contribution *narrower* than it was under prior law. Nothing about the language of § 113 suggests, let alone commands, that result.

[8] As the EPA has explained, "EPA believes that the [NCP] requirement that private party responses comply with all applicable Federal, State and local requirements, including permit requirements, as appropriate, is sufficient to deter poorly planned cleanup proposals and minimize the possibility of independent private party and government responses." 50 Fed. Reg. 47,912, 47,934 (1985).

Instead, § 113(f)(1) is plainly and sensibly read to mean exactly what it says. A PRP "may" seek contribution "during or following" a "civil action" under CERCLA. With that sentence, Congress identified a common situation giving rise to contribution claims by PRPs, and confirmed the validity of pre-SARA case law finding a right of contribution in those circumstances. But that specific endorsement does not restrict the right to seek contribution in other circumstances: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [CERCLA]." As the *en banc* court held, "[T]he first and last sentences of § 113(f)(1) combine to afford the maximum latitude to parties involved in the complex and costly business of hazardous waste site cleanups." Pet. App. 27a.

1. Section 113(f)(1) provides that contribution "may" be sought "during or following any civil action" under CERCLA. Petitioner would read that provision as establishing the exclusive time in which actions for contribution must be brought. But as the *en banc* court of appeals concluded, that reading would revise the statute so that "may" becomes "may only." Pet. App. 24a. The more obvious interpretation of the permissive "may" is that Congress allowed a right of contribution during or after a civil action but did not intend to *limit* that right to such circumstances. *Id.*; *see also* BLACK'S LAW DICTIONARY 993 (7th ed. 1999) (defines primary meaning of "may" as "is permitted to" and states: "This is the primary legal sense – usu. termed the 'permissive' or 'discretionary' sense."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993) (defining "may" as having permission or the liberty to do something).

In prior cases, the Department of Justice has read § 113(f)(1) in just that manner:

> The plain language of CERCLA § 113(f)(1) is not restrictive, i.e., it does not say that a contribution action may only be brought during or following a civil action under § 106.

Centerior Br., App. 32A (arguing that action for contribution may be brought in absence of civil action under CERCLA) (emphasis in original). The fact that the statutory language appeared to Department of Justice to be wholly *permissive* in the *Centerior* case is difficult to reconcile with any claim that the statutory text is so "plain" that it admits of only one – entirely contrary – reading today.

If, as petitioner argues, the word "may" is read to mean "may only," then it follows that actions for contribution may not be brought when clean-ups are undertaken in compliance with federal or state administrative orders. Section 113(f)(1) allows actions for contribution "during or following any *civil action*," and an administrative order is not a "civil action."[9] Such a restriction on the scope of contribution is inconsistent with over twenty years of settled lower-court precedent and the traditional position of the Department of Justice, *see Centerior* Br., App. 8A-9A. It is also inconsistent with the

[9] Though petitioner appears to fully embrace this position, the original Fifth Circuit panel, which otherwise ruled for petitioner, could not accept this conclusion. Instead, it revised § 113(f)(1) so that "civil action" became "civil action or administrative order." Pet. App. 97a. The dissenters to the *en banc* decision below rejected that creative rewriting of the statute, and acknowledged that a right of contribution would exist in cases involving administrative orders only if a party failed to comply with the order and was then sued in federal court. *Id.* at 36a n.34. Under that view, parties would have a perverse incentive to violate administrative orders so that they could establish a right to contribution under § 113.

petitioner's and the Solicitor General's discussion of contribution in this very case: Under virtually any possible interpretation of traditional common-law contribution principles, a jointly responsible party who has been compelled by the government to clean up property is deemed to discharge the liability of other jointly liable parties. *Centerior* Br., App. 33A-35A.

2. In addition to using the permissive "may" in the first sentence of § 113(f)(1), Congress made its intent unmistakably clear by including a "savings clause" in the final sentence: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the *absence* of a civil action" under CERCLA. It would have been difficult for Congress to make more plain that it did not intend the "during or following" a civil action language to act as a restriction on the right to pursue contribution in other circumstances. *See* Pet. App. 22a.

That has been the traditional position of the Department of Justice. In combination with the first sentence of § 113(f)(1), the Department has explained, the savings clause at the end shows that a "contribution action" after a voluntary clean-up "is allowed by the very terms of the statute." *Centerior* Br., App. 32A-35A. The contrary interpretation adopted by petitioner in this case, according to the Department, would "read out the last sentence of § 113(f)(1)" altogether. *Id.* at 33A.

In order to give the savings clause some meaning, petitioner, and now the Solicitor General, suggest that it is designed only to preserve *state* common-law contribution claims. Of course, that is not what the sentence says. And when Congress intended to preserve state law from preemption under CERCLA, it knew how to say so: CERCLA contains at least two explicit state-law "savings clauses" that

would, on petitioner's reading, become surplusage.[10] More important, contrary to petitioner's breezy suggestion, it is not at all obvious that Congress intended to preserve state-law contribution remedies from preemption under § 113 or § 107. Indeed, two federal circuit courts already have held to the contrary. *See Bedford Affiliates*, 156 F.3d at 425; *In re Reading Co.*, 115 F.3d at 1117. In an effort to bolster its strained reading of § 113(f)(1)'s savings clause, petitioner would have this Court decide an entirely different and very difficult question of preemption law, without the benefit of consideration of the issue by the court below. The Court should decline that invitation and give the savings clause its plain meaning: Nothing in subsection 113(f)(1), including the reference to actions "during or following" CERCLA suits, restricts a PRP's right to seek contribution at any time.

Finally, petitioner notes that the last sentence of § 113(f)(1) does not affirmatively create a right of contribution, but simply provides that rights of contribution are "not diminished" by anything in the subsection. That is correct. The right to contribution does not arise from the savings clause of § 113(f)(1), but is simply *preserved* by that sentence. The right itself flows from § 107. As the Ninth Circuit has explained, "while § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 113." *Pinal Creek Group*,

[10] Section 302(d) of CERCLA provides that nothing in CERCLA "shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law . . . ." 42 U.S.C. § 9652(d). Section 114(a) provides that CERCLA does not preempt "any State from imposing any additional liability" with respect to hazardous substances. *Id.* at § 9614(a).

118 F.3d at 1301.[11] The Department of Justice has endorsed the same understanding – that liability for contribution arises from § 107, while § 113 "fills [the] void" left by § 107 by specifying precisely what "form that liability should take." *Pinal* Br. at *10.

In short, the last sentence of § 113(f)(1) acts not as a savings clause preserving *state* claims, but as an express reservation of CERCLA's once-implied right of contribution – which is not "diminished" in any way by the "during or following" language found earlier in the subsection.

C. Nothing In The Legislative History Or Statutory Structure Compels A Different Result.

1. The plain language of § 113(f)(1) avoids the need to resort to legislative history. But in any event, that history is perfectly consistent with the obvious and sensible reading given § 113(f)(1) by the *en banc* court below.

Only one thing is clear from the legislative history. In adopting § 113(f), Congress intended to "clarify" and "confirm" the right of contribution that federal courts had previously found implied in the statute. *See, e.g.*, H.R. Rep. No. 99-253, pt. I, at 59, 79 (1985); S. Rep. No. 99-11, at 44 (1985); 131 Cong. Rec. 24,450 (1985) (statement of Sen. Stafford) (predicting that § 113 would "remove any doubt as to the right of contribution"). Nothing in the legislative his-

[11] *See also New Castle County*, 111 F.3d at 1122 (§ 113 "does not in itself create any new liabilities; rather, it confirms the right of a [PRP] under section 107 to obtain contribution from other [PRPs]"); *United Tech.*, 33 F.3d at 102 n.10; *United States v. ASARCO, Inc.*, 814 F. Supp. 951, 956 (D. Colo. 1993) ("Section 113(f), however, does not create the right of contribution – rather the source of a contribution claim is section 107(a). Under CERCLA's scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties.") (citations omitted).

tory indicates that Congress intended to cut back on the then prevailing right of PRPs who cleaned up property either voluntarily or in response to a government order to seek cost recovery or contribution under § 107.[12] Petitioner, however, would read section 113(f) as an axe with which Congress lopped off the prior rights of these PRPs. Nowhere in the limited legislative history does Congress suggest any intent to drastically curtail a PRP's pre-existing right to seek cost recovery under CERCLA.[13]

Beyond confirming Congress' intent to approve a right of contribution, the legislative history must be viewed with caution. Section 113(f) was preceded by several drafts with varying language, and selective quotation from the legislative history obscures the fact that many references were to differing versions of what finally became § 113(f). *See* Pet. App. 78a (Weiner, J., dissenting). The legislative history is particularly confused and inconsistent regarding any congressional intent on the timing of a right of contribution. Some statements in the legislative history indicate that Congress generally intended to confirm a right of contribution by

[12] Petitioner states that, prior to SARA, no federal court had recognized a cause of action for contribution except in cases following federal civil actions. That is incorrect. As the *en banc* court below explained, *all* of numerous cost-recovery claims by PRPs recognized by federal courts under § 107 were *inherently* actions for contribution. As the court of appeals explained, in the pre-SARA era, "lower federal courts were implementing, albeit unevenly, contribution rights that did not depend on pre-existing EPA administrative orders and that did not arise solely 'during or following' CERCLA enforcement actions." Pet. App. 18a.

[13] As the *en banc* court noted, "It would seem odd that a legislature concerned with clarifying the right to contribution among PRPs and with facilitating the courts' development of federal common law apportionment principles would have rather arbitrarily cut back the then-prevailing standard of contribution. In no even does the history 'overwhelmingly support' the panel majority's narrow view of the statute." Pet. App. 22a.

responsible parties. *See, e.g.*, H.R. Rep. No. 99-253, pt. I, at 59 (1985) ("The bill would give potentially responsible parties the explicit right to sue other liable or potentially liable parties who also may be responsible for the hazardous waste site."); *id.* at 266 ("The section would also establish a federal right of contribution or indemnity for persons *liable* under § 106 or § 107 of current law . . . .") (emphasis added); S. Rep. No. 99-11 (1985) (principal goal of new section was to "clarif[y] and confirm[ ] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the clean-up cost that may be greater than its equitable share under the circumstances."). Other statements indicate that members of Congress understood that the right of contribution exists during or following a federal civil action. *See, e.g.*, H.R. Rep. No. 99-253, pt. I, 79 (1985) ("This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties.").

These snippets of language add little to understanding the availability of a right to contribution in the absence of a prior civil action, or the meaning of the last sentence in § 113(f)(1). At most, the phrases indicate that Congress confirmed a right of contribution during and following a federal civil action; they simply are silent on whether a federal right to contribution exists at other times.[14]

[14] Judge Weiner, in his dissent from the original panel decision in this case, expressed appropriate concern about reliance on fragments from the legislative history in this case. "I am mystified by the majority's willingness to cast aside its healthy skepticism about legislative history to read so much into the absence of legislative discussion on this issue, especially when the plain language of the statute, through its savings clause, expressly contemplates actions for contribution in the absence of civil actions under § 106 or § 107(a)." Pet. App. 79a. *See also Pfohl Brothers Landfill Steering Comm. v. Allied Waste Sys. Inc.*, 255 F. Supp.

Nor does the legislative history support petitioner's reading of the savings clause of § 113(f)(1). Petitioner, as a result of its convoluted reading of the statute, is forced to argue that the last sentence of § 113(f) was intended to preserve state common law contribution claims from preemption by federal law. Nothing in the legislative history of § 113(f), however, indicates that Congress had any intention to address the issue of federal preemption. Petitioner would impute to Congress the intent to resolve a fundamental issue of federal-state relations without so much as a comment.

2. Petitioner argues that the statute of limitations provisions of § 113(g) require that § 113(f)(1) be read to preclude contribution actions that do not arise during or after CERCLA civil actions. Section 113(g) provides for two separate statutes of limitations: § 113(g)(2), applicable to cost-recovery actions under § 107, pegs the limitation period to commencement or completion of clean-up activities; § 113(g)(3), applicable to an "action for contribution," uses the date of judgment or settlement as a referent point for the limitations period. Because § 113(g)(3) relies on judgment or settlement to calculate the limitations period, petitioner argues, there can be no cause of action for contribution absent such a judgment or settlement.

If § 113(g) is problematic, it is a problem that has been solved. The courts of appeal that have addressed the issue have concluded that an action by a PRP brought in the absence of a prior judgment or settlement is for limitations purposes an "initial action for recovery" subject to § 113(g)(2)'s statute of limitations. *See Geraghty & Miller, Inc.*, 234 F.3d at 917; *Sun Co. v. Browning-Ferris, Inc.* 124 F.3d 1187, 1191 (10th Cir. 1997); *see also Cytec Indus., Inc.*

2d 134, 153 n.17 (W.D.N.Y. 2003) (rejecting implication from the legislative history drawn by the majority panel decision in *Aviall*).

v. B.F. Goodrich Co., 232 F. Supp. 2d 821 (S.D. Ohio 2002) (applying Sixth Circuit opinion in *Centerior Serv. Co.*, 153 F.3d at 344).[15] In doing so, each court of appeals has nonetheless concluded that the action by the PRP retained its essential character as an action for contribution and was therefore properly brought under § 113(f). There is no need for the Court to address the statute of limitations issue in this case, and – as experience in the lower courts shows – nothing about the statute of limitations provision precludes the reading of § 113 advanced by Aviall and adopted by the court below.

II. PETITIONER'S POSITION IS INCONSISTENT WITH BOTH THE LEGISLATIVE PURPOSE BEHIND CERCLA AND DECADES OF SETTLED CASE LAW.

A. Petitioner's Position Would Lead To Results That Are Directly Contrary To The Congressional Intent Behind CERCLA.

The position of the *en banc* court of appeals is consistent not only with the plain language of the statute but also with the fundamental purposes of CERCLA. In contrast, petitioner advances a position whose consequences fly directly in the face of Congress' objectives and produce a result so

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[15] Courts have considered two other approaches to the statute of limitations issue when a PRP commences a cost-recovery action in the absence of a judgment or settlement. *See City of Merced v. R.A. Fields*, 997 F. Supp. 1326, 1334-35 (E.D. Cal. 1998) (in addition to treating such a claim as an "initial action" subject to § 113(g)(2), courts have considered the possibility of (1) applying § 113(g)(3) but importing a different triggering event or (2) concluding that CERCLA contains no statute of limitations in such cases). No court of appeals, however, has adopted an approach other than that referred to in the text above – simply applying § 113(g)(2).

odd and counter-intuitive that it is almost impossible to defend as a matter of legislative intent or public policy.

1. An important objective of CERCLA is to encourage parties to undertake clean-ups voluntarily, without the need for government compulsion or intervention. *See* H.R. Rep. No. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119 ("The legislation would establish a Federal cause of action in strict liability to enable the [EPA] Administrator to pursue rapid recovery of the costs incurred for the costs of such [clean-up] actions undertaken by him from persons liable therefore and *to induce such persons voluntarily* to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.") (emphasis added). This purpose has consistently been acknowledged by the federal courts. *See Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990) (describing CERCLA's "manifest legislative intent to encourage voluntary private cleanup action"); *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986) ("A review of CERCLA's legislative history shows one of the Act's principle [sic] goals to be the achievement of expeditious response to environmental hazards through *voluntary compliance* by responsible parties.") (emphasis in original).

If adopted, petitioner's position would have the obvious effect of removing a significant incentive to voluntary clean-up. Under petitioner's view, PRPs who undertake voluntary clean-ups would have no mechanism under CERCLA for seeking a fair share of costs from other responsible parties.

But the consequences of petitioner's position go further than that. Petitioner's reading of the statute would actually erect affirmative *disincentives* to voluntary action: in order to obtain a right of contribution under CERCLA, PRPs must *avoid* voluntary clean-up and instead provoke federal involvement. If a PRP did not want to absorb the entire cost of

a clean-up for which it was only partly responsible, it would have no choice but to wait to receive an administrative order rather than proceeding voluntarily – and then violate that order to provoke federal judicial enforcement. Alternatively, PRPs would be encouraged to wait for a government clean-up of the property and then a government suit to recover its costs. Nothing in the language or history of CERCLA warrants a construction that increases the need for federal involvement and discourages voluntary clean-ups.

2. It is undisputed that a key purpose of CERCLA is not only to ensure the proper clean-up of contaminated property, but also "to hold responsible parties liable for the costs of these cleanups." H.R. Rep. No. 99-253, pt. 3, at 15 (1985). In other words, those parties who are responsible for a release of hazardous substances should bear their fair share of the cost of clean-up of those hazardous substances. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989), *overruled on other grounds by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986).

Under petitioner's reading, however, negligent PRPs are essentially immune from liability if another PRP has cleaned up property either voluntarily or in response to a government order. In such a case, petitioner argues, the PRP who cleans up the property has no cause of action against other PRPs – who are thus freed from any obligation to pay their fair share of costs. The PRP who accepts responsibility for the clean-up, or who is singled out for a government order, bears the entire cost of the clean-up, while other jointly and severally liable parties remain free from responsibility or liability. That outcome runs directly counter to a basic purpose of CERCLA.

3. Congress also intended CERCLA to establish a clear, uniform rule of liability for the clean-up of hazardous sub-

stances. *See, e.g.*, 126 Cong. Rec. 11787 (1980) (statement of Rep. Florio) ("To ensure the development of a uniform rule of law, and to discourage business [sic] dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in this area."); *Wade*, 577 F. Supp. at 1337; *Wehner*, 616 F. Supp. at 27; *United States v. A&F Materials Co., Inc.*, 578 F. Supp. 1249 (S.D. Ill. 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. at 802. Such a uniform national rule avoids a "race to the bottom" in which industries move to states with the most lenient rules of liability, and also provides certainty to commercial transactions. A uniform national rule of liability, including a right of contribution, promotes Congress' intent in this area and avoids the "balkanization" of national environmental policy.

But under petitioner's view, the contribution claims of PRPs who clean up property either voluntarily or at the direction of a government order would be subject to inconsistent state rules of contribution. Petitioner has helpfully noted that many states have adopted general rules of contribution among tortfeasors.[16] What petitioner fails to note, however, is the wide variety and inconsistency among the states re-

[16] *See* Pet. Br. at 18 n.11. As noted above, however, the status of state common law contribution claims for recovery of hazardous waste clean-up costs is in some doubt. Several courts have held that such common law claims are preempted if they conflict with the provisions of CERCLA. *See supra* at 20. The issue of preemption of state common-law claims is not before this court and need not be addressed if Aviall's position is adopted. Under the petitioner's view, however, the last sentence of § 113(f)(1) specifically preserves such state laws. If that view were accepted by the Court, the effect would be to reverse the holdings of the courts of appeals and preclude the opportunity for continued development of the issue by lower courts.

garding a statutory right of contribution by responsible parties who undertake the clean-up of hazardous substances.[17]

[17] There is enormous variety in the availability, scope, and prerequisites of state statutory provisions dealing with the right of contribution for parties cleaning up property. Thirteen states and the District of Columbia appear to have no statutes specifically authorizing a general right of contribution by parties who clean up property contaminated by hazardous substances. These include Colorado, the District of Columbia, Idaho, Iowa, Illinois (*see NBD Bank v. Krueger Ringier Inc*, 686 N.E.2d 704 (Ill. App. Ct. 1997); *Chrysler Realty Corp. v. Thomas Indus., Inc.*, 97 F. Supp. 2d 877 (N.D. Ill. 2000)), New Mexico, North Dakota (N.D. St. 23-29-16; limited right of contribution by officers and directors of solid waste landfill disposal facility), Rhode Island, South Carolina, (S.C. 1976 § 44-56-750 provides only for protection from CERCLA contribution if voluntary clean-up); South Dakota, Virginia, Wisconsin, and Wyoming.

State statutes that do authorize a right of contribution vary substantially. One state provides for contribution if clean-up was initiated by the state. *See* Ark. Stat. Ann. § 8-7-502. Another state defines its own right of contribution by reference to CERCLA sections 107 and 113. *See* Ky. Rev. Stat. Ann. § 224.01-400(25). Other states generally allow for a right of contribution if the clean-up is consistent with state law. *See* Cal. Health & Safety Code 25363(e); Del. Stat. 7 § 9105(d); Haw. Rev. Stat. § 128D-18; N.H. Rev. Stat. § 147-B:10.III(b). Two states require state approval of the clean-up. *See* La. Rev. Stat. § 30:2276.G(3); Tex. Health & Safety Code § 361.344. Others generally allow contribution for the reasonable or necessary costs of clean-up. *See* Ariz. Rev. Stat. § 49-1019; Mass. Gen. Laws ch. 21E § 4; Minn. Stat. § 115B.04. One state provides a right of contribution if the release resulted from a prohibited discharge. *See* Fla. Stat. § 376.313. Some states provide a more general right to contribution following clean-up of hazardous substances. *See* Alaska Stat. § 46.03.822(j); Md. Code, Envir. § 7-221(d); Mich. Comp. Laws § 324.20126a(7); Mont. St. § 75-10-724; N.J. Stat. § 58:10-23.11f; Pa. Cons. Stat. 35 § 6020.75; 10 Vt. Stat. Ann. § 6615(i). Finally, still other states simply refer to a right of contribution or provide contribution protection following certain types of voluntary or brownfield clean-ups. *See* Ind. Code § 13-25-5-20; Me. Rev. Stat. tit. 38, § 343-E; N.Y. Envtl. Conserv. § 27-1421; Ohio Rev. Code, § 122.659; Tenn. Code § 68-212-224; Utah Stat. § 19-6-325(5)(a).

The situation in the Fifth Circuit is instructive. Texas and Louisiana provide statutory rights of cost recovery to responsible parties that vary in their details and requirements; Mississippi has no right of contribution at all. Within the Fifth Circuit alone, a PRP's right to contribution would vary drastically – and often hinge on complicated "choice of law" questions – if the view of the petitioner were adopted. Such an approach to the remediation of hazardous substances is simply inconsistent with Congress' intent to develop a uniform, national rule of liability.[18] Indeed, § 113(f)(1) itself provides that the right of contribution under CERCLA "shall be governed by federal law."

4. A uniform federal rule that PRPs have a right of contribution under CERCLA creates no additional risk that PRPS will be subject to multiple or piecemeal litigation. Petitioner and the Solicitor General raise the specter of private parties, unleashed to undertake inadequate clean-ups, who would sue other PRPs in contribution. PRPs held liable in such contribution actions would, in the view of petitioner and the Solicitor General, apparently be subject to additional liability as the government repairs the damage caused by these inadequate voluntary clean-ups. Pet. Br. 34; SG Br. 28.

That view misunderstands the structure and operation of CERCLA. First, as discussed above, in order to qualify as recoverable damages in an action for contribution, the clean-

[18] Relegating contribution claims to state courts also shields from liability the largest PRP – the federal government. Although CERCLA plainly waived sovereign immunity for claims brought under its provisions, it did not waive immunity for claims made against the United States under state law. *See Maine v. Department of Navy*, 973 F.2d 1007, 1010, 1011 (1st Cir. 1992) (Breyer, C.J.); *O'Neal v. Department of the Army*, 742 A.2d 1095 (Pa. 1999) (dismissing environmental claims against Army because of sovereign immunity).

up costs must be substantially "consistent with the National Contingency Plan." *See, e.g., Amoco Oil Co.*, 889 F.2d at 672. Because the NCP provides that response actions taken by private parties must result in a "CERCLA-quality cleanup," 40 C.F.R. § 300.700(c)(3)(i), there is little risk that an approved clean-up will require further government intervention and hence impose additional liability on PRPs. *See supra* at 15-16.

Second, even following a civil action or settlement with the government, most PRPs remain liable for any additional actions that might be necessary at the site. Section 122(f)(6) of CERCLA provides for only a limited "covenant not to sue" when the government settles with most PRPs,[19] and the government is required in most cases to reserve the right to undertake additional action for matters arising from new information.[20] Thus, despite the Solicitor General's suggestions to the contrary, SG Br. at 21, a lawsuit or settlement by the government is not, in most cases, a dispositive determination of liability. Allowing contribution by private parties who voluntarily or under government order incur damages from a "CERCLA-quality cleanup" in a manner consistent with the National Contingency Plan creates no greater risk of subsequent federal action and multiple litigation.

[19] A complete covenant not to sue is available only for a class of "de minimis" settlements involving parties who contributed a small fraction of hazardous substances at a site. *See* CERCLA § 122(g), 42 U.S.C. § 9622(g).

[20] *See* CERCLA § 122(g)(6), 42 U.S.C. § 9622(g)(6).

B. Petitioner's Position Is Contrary To Decades Of Well-Established Federal Law And Would Undermine The Expectations Of Businesses Across The Country.

1. The decision below is the first by any federal court of appeals expressly to address the question at issue: whether the language of § 113(f)(1) precludes a PRP from bringing an action for contribution in the absence of a civil action or settlement.[21] Since the Fifth Circuit's *en banc* decision was issued, virtually every federal court that has considered the issue has agreed with the conclusion reached below. *See Western Properties Servs. Corp. v. Shell Oil Co.*, 358 F.3d 678, 684 (9th Cir. 2004) (agreeing with *en banc* decision below); *1325 "G" Street Assocs., LP v. Rockwood Pigments NA, Inc.*, 235 F. Supp. 2d 458 (D. Md. 2002) (same); *Niagara Mohawk Power Corp. v. Consolidated Rail Corp.*, 291 F. Supp. 2d 105 (N.D.N.Y. 2003) (same). And prior to its reversal by the *en banc* court of appeals, the decision of the Fifth Circuit panel in *Aviall* was rejected by every district court to consider the issue. *See City of Waukesha v. Viacom, Inc.*, 221 F. Supp. 2d 975 (E.D. Wis. 2002); *Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F. Supp. 2d 203 (D. Conn. 2001).[22]

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[21] This absence of litigation is itself noteworthy to the court below. Section 113(f) was adopted almost seventeen years ago; yet in all that time no party seems to have deemed the issue in this case sufficiently cogent to be raised to a court of appeals. With a nod to Conan Doyle, Judge Jones noted: "Given the enormous monetary exposure and the volume of litigation surrounding CERCLA mandates, one must assume that talented attorneys have had sufficient incentive and opportunity to explore statutory lacunae such as those created by a cramped reading of § 113(f)(1). Yet all that existed before this case arose are isolated dicta. The absence of direct precedent is like the dog that didn't bark." Pet. App. 29a. One need not be Sherlock Holmes to appreciate that the absence of litigation reflects the common understanding that CERCLA authorizes a right of contribution by PRPs even in the absence of a civil action or settlement.

2. Although no court of appeals prior to this case had been called upon to address directly whether a right of contribution exists in the absence of a federal civil action or settlement, federal courts in the preceding seventeen years have universally allowed claims for contribution to be brought in circumstances that would, on petitioner's view, bar such claims. The Fourth, Second, and Seventh Circuits have allowed actions for contribution by PRPs following state-ordered clean-ups, in the absence of any litigation or settlement. *See Crofton Ventures LP v. G&H P'ship*, 258 F.3d 292 (4th Cir. 2001); *Bedford Affiliates*, 156 F.3d at 416; *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998).[23] The Sixth Circuit has allowed a CERCLA contribution action to proceed following issuance of a federal admin-

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[22] The only court to reach a contrary conclusion was the district court in *E. I. Du Pont de Nemours & Co. v. United States*, 297 F. Supp. 2d 740 (D.N.J. 2003). In *Western Properties Service Corp. v. Shell Oil Co.*, 358 F. 3d 678 (9th Cir. 2004), the Ninth Circuit held that the plaintiff could proceed because it had pleaded a cause of action under § 107 as well as § 113; because the source of the right to contribution was § 107, the plaintiff had, in effect, brought its claim for contribution "during" a civil action under § 107. *See* 358 F.3d at 685. Though *Western Properties* attempted to distinguish *Aviall* on its facts, the relevant facts are actually the same here: as discussed earlier, *supra* n.4, Aviall has expressly pleaded a combined cause of action brought under both sections 107 and 113. Thus, the holding of *Western Properties* is directly applicable to this case.

[23] *Rumpke of Ind. v. Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997), contains ambiguous dicta that could be read as limiting a right of contribution under § 113(f) to situations in which a PRP sues "during or following" a federal "civil action." That dicta, however, cannot be the law of the Seventh Circuit following *PMC*. As noted above, the Seventh Circuit in *PMC* allowed a CERCLA contribution action to proceed following a state, but not federal, enforcement order.

istrative order but prior to any federal "civil action" under sections 106 or 107. *See Centerior Serv. Co.*, 153 F.3d at 349. And the Ninth Circuit has allowed actions for contribution following voluntary clean-ups. *See Pinal Creek Group*, 118 F.3d 1298. Indeed, even this Court, in *Key Tronic*, considered a § 107 cost-recovery claim by a PRP for costs outside the scope of a settlement – a claim that, by petitioner's logic, could not be brought under CERCLA. *Key Tronic*, 511 U.S. at 1963.

This line of precedent is particularly telling because § 113 is often the sole basis for federal jurisdiction in what would otherwise be state-law actions for contribution. To the extent that jurisdiction rests on invocation of § 113, it would have been incumbent on the courts themselves to consider whether that section was applicable, regardless of whether the issue was raised by litigants. The absence of any decision holding that § 113 does not allow for contribution absent a judgment or settlement is thus especially significant.

3. The Environmental Protection Agency, the executive agency with primary responsibility for the implementation of CERCLA, has consistently supported the right of cost- recovery by private parties who, either voluntarily or following government orders, clean up contaminated property. This view is expressed in the National Contingency Plan, a set of EPA regulations adopted through the notice and comment procedures of the Administrative Procedure Act.

The NCP regulations specifically contemplate an action for recovery by a PRP in the absence of a settlement or civil action. Subpart H of the NCP defines the requirements that apply to "activities by other persons." This Subpart explicitly begins with the provision that "any person may undertake a response action to reduce or eliminate a release of a hazardous substance . . . ." 40 C.F.R. § 300.700(a). The

provisions of Subpart H then specifically address when, for purposes of cost-recovery, private party actions will be considered "consistent with the NCP." *Id.* § 300.700(c)(3). Expressly included are clean-ups by private parties undertaken pursuant to an administrative order; such actions are *per se* consistent with the NCP. *Id.* § 300.700(c)(3)(ii). The remaining complex provisions of Subpart H only apply to private parties who clean up in the absence of a federal administrative order, settlement, or civil action. As noted above, EPA considers such private party clean-ups to be appropriate because these elements of the NCP ensure that such private clean-ups are conducted properly. 50 Fed. Reg. 47,912, 47,934 (1985).

Under the construction of CERCLA adopted by the petitioner, however, responsible parties have no cause of action under CERCLA at all in the absence of a federal settlement or civil action. If that construction were correct, the provisions of Subpart H would be rendered largely meaningless, and the EPA's clear and long-held understanding that PRPs may, consistent with the NCP, recover costs when they undertake clean-ups either voluntarily or in response to government orders would be rejected.

4. Since the passage of CERCLA, PRPs have relied on their federal right to recover clean-up costs from other PRPs when buying contaminated property. *See* Brief for Lockheed Martin as Amicus Curiae; Brief for Superfund Settlements Project, et al. as Amicus Curiae. Without this right, many properties would remain contaminated and unusable. Hence a buyer's ability to recover clean-up costs from others promotes the marketability of contaminated property and furthers the re-development of brownfields.

III. IF THIS COURT ADOPTS PETITIONER'S INTERPRETATION OF § 113, IT MUST REMAND FOR CONSIDERATION OF AVIALL'S CLAIM UNDER § 107.

Aviall has, as discussed above, brought this action jointly under sections 107(a)(4)(B) and 113(f). If, as petitioner argues, respondent's action is not governed by § 113, then this Court should remand for consideration of Aviall's remaining claim under § 107(a)(4)(B).

1. Since the enactment of SARA in 1986, courts of appeals have uniformly held that responsible PRPs seeking an equitable allocation of costs with other PRPs must sue in contribution under the provisions of § 113(f), rather than under § 107. Limiting PRPs to claims in contribution under § 113 ensured that an equitable allocation of costs could be made among jointly liable parties and that the "contribution protection" provisions of § 113(f)(2) could effectively protect settling parties. *See supra* at 5.

Petitioner, joined by the Solicitor General, now effectively attacks that position, arguing that the basis for those decisions – that a claim by one PRP against another is *inherently* one for contribution, regardless of the existence of a civil action or settlement – is incorrect. That position, if adopted, necessarily reopens the possibility that a broad class of PRPs have an independent claim for cost recovery under § 107. To be sure, petitioner and the Solicitor General reject this conclusion, and argue that PRPs have no right to recover at all in the absence of a civil action or settlement. But they cannot have it both ways. If an action by a PRP who seeks recovery following a voluntary or government-ordered clean-up is an action for "contribution" within the common meaning of the term, then the action may and must be brought under § 113. If not, then the uniform case law so holding is invalidated, and there is nothing to stop such PRPs

from suing under § 107. Certainly, there is nothing in the language or legislative history of SARA to even suggest that Congress intended to severely restrict rights of cost recovery under CERCLA by precluding suit under *both* § 113 and § 107.[24]

2. Petitioner's argument would thus create a different allocation of claims by PRPs between § 113 and § 107. PRPs who seek cost recovery "during or following" a "civil action" or following an administrative or judicial settlement can and must sue in contribution under § 113(f). All other parties, including PRPs who seek cost recovery following a

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[24] The Solicitor General argues that respondent is precluded from arguing that § 107 provides an independent basis for recovery because respondent brought this action jointly under sections 113 and 107, rather than under § 107 alone. SG Br. at 21 n.10. But in fact, respondent has asserted a claim under § 107, consistently maintaining that its action is brought under *both* § 107 and § 113. That is because courts of appeals, supported by the Department of Justice, have held that § 107 is the source of a right of cost recovery, including contribution, and § 113 operates by providing the "mechanics" of contribution. *See supra* at p. 19. If this Court were to hold that § 113 does not apply to this action, Aviall's underlying claim under § 107 would still remain.

In any event, if the Court adopts petitioner's position in this case, future PRPs will simply plead an exclusive cause of action under § 107, and the Court will be obliged to address the issue of § 107's application at a later date. If, as the Solicitor General urges, a nuance of pleading precludes the Court from addressing the fundamental relationship between sections 107 and 113, then perhaps this Court should wait to address the matter until, in the view of the Solicitor General, it is presented with a case that allows it to do so fully and efficiently, and dismiss the grant of certiorari in this case. That is especially true considering (1) the absence of any split among the circuits on the issue of the scope of § 113(f), (2) the well-reasoned *en banc* decision of the Fifth Circuit, (3) the unexplained reversal in position of the Department of Justice, and (4) the existence of a well-established and properly working set of understandings and expectations about the right of contribution under CERCLA.

voluntary or government ordered clean-up, must sue exclusively under § 107(a)(4)(B). This would be consistent with petitioner's view of both the traditional common-law understanding of the term contribution and the statute of limitations provisions of § 113(g).[25]

There is something to be said for this position, and if the Court adopts it, Aviall will proceed accordingly in the court below. But there is more to be said against petitioner's position. The courts of appeals have uniformly rejected it, in part because a conclusion that some broad class of PRPs has an independent cause of action under § 107(a)(4)(B) would threaten the "contribution protection" provisions of § 113(f)(2), and in part because a cause of action under § 107(a)(4)(B) would give PRPs an inappropriate right to recover all of their response costs from other PRPs without regard to the equitable allocation available through contribution.[26]

This Court need not redefine the existing understanding of the relationship between sections 113(f)(1) and 107(a)(4)(B). The existing case law is logical, coherent, and consistent with the language and purpose of CERCLA.

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[25] Some courts have been concerned by the possibility that PRPs, suing exclusively under § 107(a)(4)(B), might be able to avoid the equitable allocation of costs that exists in an action for contribution under § 113(f). This concern may be misplaced. Defendants, faced with a claim under § 107(a)(4)(B), may plead a counterclaim for contribution under § 113(f) "during" this civil action. Thus, a court, in one proceeding, could address all issues relevant to an equitable allocation of costs. *See Western Props. Servs. Co.*, 358 F.3d at 658. Courts have avoided the complications arising from this approach by their universal holding that an action by a PRP for cost recovery is a claim for contribution initially governed by § 113(f). *See Pinal Creek Group*, 118 F.3d at 1303.

[26] *See, e.g., Bedford Affiliates*, 156 F.3d at 425; *New Castle Co.*, 111 F.3d at 1121.

Quite simply, it works. The Court should resist the invitation of the petitioner to disrupt the settled and effective structure of CERCLA.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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April 8, 2004

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 97-3163

CENTERIOR SERVICE COMPANY, GENERAL ELECTRIC COMPANY, AND ASHLAND OIL, INCORPORATED
Plaintiffs-Appellants,

v.

ACME SCRAP IRON & METAL CORPORATION, et al.,
Defendant-Appellees.

On Interlocutory Appeal from the United States District Court
for the Northern District of Ohio, Eastern Division

PROOF BRIEF OF DEFENDANTS-APPELLEES SECRETARY OF DEFENSE, SECRETARY OF VETERANS AFFAIRS, AND ADMINISTRATOR OF NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under the Comprehensive Environmental Response. Compensation, and Liability Act ("CERCLA") § 113(b). 42 U.S.C. § 9613(b). This Court has jurisdiction over the appeal pursuant to its order of February 13, 1997 granting appellant's petition pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUE

Whether the district court correctly ruled that a private responsible parry that has conducted an emergency hazardous waste cleanup pursuant to a CERCLA § 106 Administrative Order cannot bring a cost recovery claim alleging joint and several liability under CERCLA § 107(a).

STATEMENT OF THE CASE

1. Statutory Background. CERCLA, 42 U.S.C. § 9601 et seq., was enacted in 1980 to address the vast problems associated with hazardous waste disposal sites. The statute was reauthorized and amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (Oct- 17. 1986).

CERCLA provides the Environmental Protection Agency ("EPA") with two alternate methods for achieving cleanup of hazardous waste sites. First, under Section 104, EPA can itself undertake "response" (i.e., cleanup) actions[1] to clean up

[1] Response actions include "removal" actions and "remedial actions." 42 U.S.C. § 9601(23), (24), (25). Remedial actions are those "consistent with permanent remedy" and are designed to prevent or mitigate danger to present and future public health and the environment. 42 U.S.C. § 9601(24). Removal actions are those actions taken to prevent or mitigate damage from the release of hazardous substances to public health or the environment, 42 U.S.C. § 9601(23).

a site, using the Hazardous Substances Superfund (the "Superfund"). 42 U.S.C. § 96004. In such cases, EPA can recover its response costs, defined under CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), from responsible parties. Alternatively, under Section 106(a), EPA can seek to require the private parties to undertake response actions, either by issuing an administrative order requiring cleanup or by seeking judicial injunctive relief. 42 U.S.C. § 9606(a).

When EPA incurs costs for response actions, those costs can be recovered froth liable parties as defined under CERCLA § 107(a), through an action under CERCLA § 107(a)(4)(A). 42 U.S.C. § 9607(a)(4)(A). In such a "cost recovery" action, the government[2] is entitled to recover all costs incurred that arc "not inconsistent with the national contingency plan." ("NCP") the EPA regulation promulgated pursuant to Section 105 of CERCLA at 40 C.F.R. Part 300.

CERCLA also authorizes private parties to bring an action to recover response costs which they incur at a site voluntarily or under compulsion by the government. Section 107(a)(4)(B) provides a claim for relief for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (emphasis added).

The liability of the responsible parties listed under Section 107(a) is strict, subject only to a few limited defenses specified in Section 107(b). *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989); *United States v Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 743 (8th Cir. 1986); *New York v. Shore Realty*

[2] CERCLA § 107(a)(4)(A) applies to all actions for response costs brought by "the United States Government or a State or an Indian tribe." CERCLA § 107(a)(4)(A).

Corp., 759 F.2d 1032, 1042 (1" Cir. 1985). Although not expressly provided for in the statute, where the government is the, plaintiff, liability under CERCLA § 107 is joint and several except to the extent that defendants can establish that the harm is divisible. *Meyer*, 889 F.2d at 1507 (citing *United States v. Chem Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983)); *County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1515 (10th Cir. 1991); *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied sub nom American Cyanamid Co. v. O'Neil*, 493 U.S. 1071 (1990); *United States v. Monsanto Co., 858 F.2d 160 (4N Cir. 1988), cert denied*, 490 U.S. 1106 (1989).

Before CERCLA was amended in 1986, the right of responsible parties to seek contribution from other responsible parties was disputed. *See City of New York v. Exxon Corp.*, 633 F. Supp. 609, 615 (S.D.N.Y. 1986); *United States v. New Castle County*, 642 F. Supp. 1258, 1269 (D. Del. 1986); *Colorado v. Asarco Inc.*, 608 F. Supp. 1484, 1490 (D. Colo. 1985); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984); *United States v. Ward*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,804, 20,806 (E.D.N.C. 1984); *City Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1140 (E.D. Pa. 1982). This made potentially responsible parties ("PRPs") reluctant to clean up CERCLA sites voluntarily, when not all PRPs would agree to participate and pay their fair share of the cleanup costs.

When CERCLA was amended in 1986, Congress added specific provisions to assure that PRPs who paid more than their fair share of liability would have an opportunity to seek contribution from other PRPS so as to encourage PRPs to settle with the government. The provision confirming the existence of contribution rights is CERCLA § 113(f)(1), which provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section [107] . . . . Such claims *shall be brought in accordance with this section* and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. 42 U.S.C. § 9613(f)(1) (emphasis added). The key provision added to encourage settlements with the government is CERCLA § 113(f)(2), which provides contribution protection to PRPs who settle with the government, as follows:
>
> A party who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims far contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f)(2).

2. Factual Background. On October 5, 1990, EPA issued a unilateral Administrative Order pursuant to CERCLA § 106(a), requiring that Centerior Service Company, General Electric Company ("GE") and Ashland Oil, Inc. (hereinafter "plaintiffs") undertake and complete an emergency cleanup to abate an endangerment to public health and the environment at the Huth Oil Site. Memorandum at 3.[3] The Administrative Order was based upon EPA's

[3] Citations to the district court's Memorandum of Opinion and Order will be "Memorandum," which is set forth in the

investigation of the site that resulted in a determination that plaintiffs were responsible under CERCLA § 107(a) for contamination of the site.[4] *Id.* Specifically, EPA determined that Ashland Oil was an owner-operator of the site and that Centerior and GE arranged for disposal of hazardous substances at the site. *Id.* Plaintiffs have not contested their liability and have not sought reimbursement from the government. Br. at 5. Plaintiffs allege that they have incurred over $10 million in cleanup costs pursuant to the Administrative Order. Br. at 5. Plaintiffs, who did not plead and have never claimed to be innocent parties, filed this action solely under CERCLA § 107, alleging that defendants[5] are jointly and severally liable to them for all of their costs incurred while cleaning up the site.

3. Course of Proceedings. In these consolidated cases, plaintiffs assert a single claim for relief: that under CERCLA § 107(a) defendants are jointly and severally liable for response costs that plaintiffs allegedly incurred in conducting

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appendix (R.983: Memorandum, Apx. at pp. XXX). Citations to the plaintiffs' opening brief in this appeal will be to "Br."

[4] Here, EPA based its Order upon its investigation and findings that plaintiffs were liable parties within the meaning of CERCLA (R, 983: Memorandum at 3, Apx. at pp.XXX; R.1008, Ex.A: Defendants' Motion for Summary Judgment, Exhibit A (EPA Administrative Order) at 4, Apx, at pp.XXX). Parties are liable under CERCLA § 107(a) based on a four part test: (1) the site in question is a "facility" as defined by CERCLA; (2) the Defendant is a "responsible person" for the spill as defined by CERCLA; (3) there was a release of hazardous substances; and (4) such release caused the Plaintiff to incur response costs.

[5] The numerous defendants in this action include private parties and government agencies.

a removal action at the Huth Oil site. On September 13, 1996, the district court, in response to a series of pending motions[6] held that plaintiffs, as potentially responsible parties, could not assert a CERCLA § 107 claim alleging joint and several liability, but instead were limited to a contribution action under CERCLA § 113. Memorandum at 23. Accordingly, the court ruled that it would interpret the complaints as asserting contribution claims under CERCLA § 113. *Id.* In reaching this decision, the district court recognized that "the Sixth Circuit has not yet spoken on the issue at hand," *id.* at 8, and noted that "[t]he majority of district courts have followed the Circuit Courts' opinions and held that PRPs were limited to recovery under Section 113." *Id.* at 14 (citing cases). The court reasoned that any other interpretation would render CERCLA § 113 "superfluous," *id.* at 20, that the legislative history made clear that CERCLA § 113 was intended to "clarify and confirm" the common law, and that allowing Section 107 joint and several liability claims by PRPs would create inequitable results. *Id.* at 22.

On December 3, 1996, the district court certified its order for appeal (R.1043: Order at 1, Apx, at pp. XXX). On February 13, 1997, this Court granted Plaintiffs' Petition for Permission to Appeal.

STANDARD OF REVIEW

This case presents a question of statutory interpretation and therefore a question of law. Accordingly, this Court reviews the question of whether the plaintiffs may bring a joint and several liability cost recovery action under CERCLA § 107(x) de novo. *United States v. Malcuit*, 104

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[6] *See* Memorandum at 4, n. 2 for a list of ten motions, before the district court. That address the issue of whether plaintiffs are restricted to bringing a contribution action under CERCLA § 113.

F.3d 880, 884 (6th Cir. 1997).

SUMMARY OF ARGUMENT

This appeal concerns the nature of the action available to a potentially responsible party that has incurred CERCLA response costs pursuant to an uncontested CERCLA § 106(a) Administrative Order. The district court correctly held that such parties are limited to an action for contribution governed by CERCLA § 113 and may not bring a separate and independent cost recovery action under CERCLA § 107 alleging that other parties are jointly and severally liable.

Every circuit court deciding this issue has held that CERCLA suits among PRPs are in the nature of an action for contribution, regardless of how the action is labeled. That plaintiffs have not formally admitted liability or otherwise been adjudicated liable does not alter the conclusion that plaintiffs are limited to a contribution action. While it is true that the statute provides that "any person" can bring a CERCLA § 107(a) claim, Congress clearly left the scope of liability to be determined in accordance with principles of the common law. According to the common law, an action by a liable party is an action in contribution, for which liability is several only. CERCLA specifically provides that actions in contribution "should be brought in accordance with [CERCLA § 113(1)(1)]." The plain language of the statute, its legislative history and the case law all indicate that while actions by PRPs arise under CERCLA § 107, they are governed by CERCLA § 113 and the law of contribution.

Conversely, the only private patties who are entitled to joint and several liability are wholly innocent, injured parties. Plaintiffs have not plead, and could not prove, that they are innocent parties. Plaintiffs' suggestion that this Court create novel exceptions for "working PRPs" or recipients of CERCLA § 106 Orders is wholly inconsistent with the law and would lead to the absurd result of allowing liable patties

to proceed on a joint and several liability basis and thus shift the entire cost of cleanup to other responsible parties.

Apart from the legal principles, policy concerns strongly counsel against allowing liable parties, including those conducting cleanups pursuant to § 106 Orders, to employ the doctrine of joint and several liability. Allowing liable parties to bring joint and several cost recovery actions under CERCLA § 107 promotes inefficiency, ancillary litigation and unfairness. Indeed, such a result would eliminate the finality Congress intended CERCLA § I 13(f)(2) to bring to the CERCLA settlement process and therefore defeat the statutory intent of encouraging settlement. In contrast, limiting private parties to actions in contribution encourages settlement and discourages litigation abuses without significantly adding new burdens or unfairly allocating orphan shares to those who voluntarily undertake cleanups. Moreover, potentially liable parties already have incentives to conduct voluntary cleanups: they are less expensive, involve less government control and may result in fair share allocations through CERCLA § 113 contribution actions.

ARGUMENT

I. THE COURTS OF APPEALS HAVE CLEARLY ESTABLISHED THAT CLAIMS BETWEEN PRPS SOUND EXCLUSIVELY IN CONTRIBUTION

The district court concluded that the plaintiffs, as potentially responsible parties, may not assert a non-contribution cost recovery action under CERCLA § 107(a), but instead are limited to bringing a contribution action under CERCLA § 113(f). All of the circuit courts that have addressed this issue have held that whatever label is applied, liable plaintiffs are entitled only to contribution, *i.e.*, "to recover from another responsible party that portion of its costs that are in excess of their *pro rata* share of aggregate

response costs." *United Technologies Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 103 (1st Cir. 1994), *cert, denied*, 115 S. Ct. 1176 (1995); *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1241 (7th Cir. 1997); *Redwing Carriers Inc. v. Saraland Apartments*, 94 F. 3d 1489, 1496 (11th Cir. 1996); *United States v Colorado & Eastern R.R Co. v Farmland Indus., Inc.*, 50 F.3d 1530, 1534-36 (10th Cir.,1995) ("CERC II"); *Akzo Coatings. Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7's Cir. 1994); *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (51st Cir. 1989). *See also Bancamerica Commercial Corp. v. Mosher Steel*, 100 F.3d 792, 800 (10th Cir. 1996); *Control Data Corp., v. S.C.S.C., Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 88-89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).[7]

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7 Plaintiffs' assertion that *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993) "explained the relationship between the plaintiff's CERCLA § 107 claim and the CERCLA § 113 contribution counterclaim" is misleading. Br. at 18; Br. at 14 n. 10. *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994), has been widely recognized as the prevailing authority in the Seventh Circuit. *Browning-Ferris*, 33 F.3d at 101; *U.S. v. Bay Battery*, 895 F. Supp. 1524, 1533 n.7 (N.D. Fla. 1995) (describing as "dubious authority"). *See also Borough of Sayreville v. Union Carbide Corp.*, 923 F. Supp. 671, 677 (D. N.J. 1996); *In re Eagle-Picher Indus. Inc.*, 197 B.R. 260, 275 (S.D. Ohio 1996); *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 651 (N.D. Ohio 1995). Even courts adopting the conclusion that liable parties may bring CERCLA § 107 actions alleging joint and several liability recognize that *Akzo* controls in the Seventh Circuit. *Adhesives, Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1239 (M.D. Pa.1996); *Laidlaw Waste Systems, Inc. v. Mallinckrodt, Inc.*, 925 F: Supp. 624, 631 (E.D. Missouri 1996). To the extent there was ever any doubt regarding whether *Amcast* or *Akzo* controlled in the Seventh Circuit, the issue was resolved in *Rumpke of Indiana, Inc. Cummins Engine*, 107 F.3d 1235, 1241 (7th Cir. 1997) (holding liable parties are limited to actions in contribution).

Courts have consistently recognized that in enacting CERCLA § 113(1), "Congress used the word 'contribution' in the conventional sense, and fully intended courts to give the word its customary meaning." *Browning Ferris Indus.*, 33 F.3d at 101. The conclusion of all of the above-cited circuit court opinions is in accord with general tort principles which hold that a claim for contribution is a claim in which one liable party seeks to recover from another liable party for the latter's share of a common liability. *See, e.g., Northwest Airlines, Inc. v Transport Workers Union*, 451 U.S. 77, 87-88 (1981); *In re "Agent Orange" Prod Liab. Litig.*, 818 F.2d 204, 207 (2d Cir. 1987); Restatement (Second) of Torts § 886A (1979): Uniform Contribution Among Tortfeasors Act (1955) ("UCATA") §§ 1, 1(a), 12 U.L.A. 63 (1975); Uniform Comparative Fault Act (1977) ("UCFA"), § 4(a), 12 U.L.A. 42 (Supp, 1994).[8] *See also* Black's Law Dictionary 399 (6th ed. 1990) (contribution defined as the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which be ought to pay or bear").

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8 The provisions of CERCLA regarding contribution claims were modeled on such principles, in particular UCFA. *United Sates v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1048 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990); *United States v. Bay Area Battery*, 895 F. Supp. 1524, 1533 (D. Fla. 1995).

Plaintiffs acknowledge this line of authority, but have asserted that *Velsicol Chemical Corp. v. Enenco, Inc.*, 9 F.3d 524 (6w Cir. 1993), and *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994), support their contention that liable parties may bring a non-contribution action under CERCLA § 107(a). Br. at 30-32. They are wrong. In *Velsicol*, the issue of whether a liable party could bring a CERCLA § 107 action alleging joint and several liability was not presented to, or addressed by, this Court.[9] Other circuit courts deciding this issue since *Velsicol* do not even mention *Velsicol*. *See, e.g., Rumpke*, 107 F.3d at 1240 (stating "The other courts of appeals that have considered the problem have agreed with our conclusion that claims properly characterized as contribution may normally be brought only under CERCLA § 11,3(f)"); *Redwing Carriers*, 94 F.3d at 1496 (deciding that liable parties limited to actions in contribution without citing to *Velsicoll*); *CERC II*, 50 F.3d at 1534-36 (same); *Browning-Ferris*, 33 F.3d at 103 (same); *Akzo*, 30 F.3d at 764 (same).

District courts in this Circuit agree. *In re Eagle*-Picher *Industries, Inc.*, 197 B.R. 260, 276 (S.D. Ohio 1996) (stating "in *Velsicol*, the question . . . simply was not presented to the Sixth Circuit"); *Darton Corp. v. Uniroyal Chemical Co.*, 917 F. Supp. 1173 (N.D. Ohio 1996) (limiting liable parties to contribution actions without citing *Velsicoll*; *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644 (N.D. Ohio 1995) (same). Even district courts deciding the other way have recognized that "*Velsicol* did not address

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[9] Rather, the Court addressed the issues of whether "the statute of limitations for a response cost recovery claim under CERCLA § 107, 42 U.S.C. § 9607 . . . should be retroactively applied to an accrued-but-not-yet-filed claim and whether the equitable, defense of lathes is available for a section 107 claim." *Velsicol*, 9 F.3d at 526.

the issue directly." *Charter Township of Oshtemo v. American Cyanamid Co.*, 910 F. Supp. 332, 336 (W.D. Mi. 1995); *Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159, 161 (W.D. Ky. 1995) (recognizing that the "Sixth Circuit has not addressed this issue"). *See generally Boyce v. Bumb*, 944 F. Supp. 807, 809 (N.D. Ca. 1996) (surveying relevant case law); *Steams & Foster Bedding v. Franklin Holding Corp.*, 947 F. Supp 790, 798-9 (D. N.J. 1996) (same); *Plaskon*, 904 F. Supp. at 651-2 (same); *Gould Inc, v A & M Battery and Tire Service*, 901 F. Supp. 906, 912-13 (M.D. Pa. 1995) (same).

Nor was the issue presented to the Supreme Court in Key Tronic,[10] which concerned the recoverability of attorneys' fees under CERCLA § 107(a)(4)(B). *Key Tronic*, 114 S. Ct. at 1963. However, *Key Tronic* contains dictum that sheds light on the issue before this Court. In reviewing pre-SARA

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[10] The circuit courts have not relied on *Key Tronic* in concluding that liable parties are limited to actions in contribution. *Rumpke*, 107 F.3d at 1242; *Redwing Carriers*, 94 F.3d at 1496; *Control Data Corp.*, 53 F.3d at 936; *CERC II*, 50 F.3d at 1534-36; *Browning-Ferris*, 33 F.3d .:at 103; *Akzo*, 30 F.3d at 764. *See also, Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 799 (D. N.J. 1996) (stating "it was not the Supreme Court's intention in *Key Tronic* to comment on the viability of a PRP's action under CERCLA § 107); *Gould Inc. v. A & M Battery and Tire Service*, 901 F. Supp. 906 (M.D. Pa. 1995); *New Castle County v. Halliburton NUS Corp.*, 903 F. Supp. 771 (D. Del. 1995); *Plaskon* Electronic Materials. Inc- v Allied-Si agn-1 Inc-, 904 F. Supp. 644 (N.D. Ohio 1995)). Even *Oshtemo* recognizes that *Key Tronic* "did not address the issue of whether a private company's cost recovery claim under section 107 should be considered or limited to a contribution claim under section 113(f)." *Oshtemo*, 910 F. Supp. at 336.

interpretations of CERCLA, the *Key Tronic* Court stated that, to the extent district courts prior to SARA interpreted CERCLA as providing a private right of action, such an action was for contribution:

> In its original form CERCLA contained no express provision authorizing a private party that had incurred cleanup costs to seek contribution from other potentially responsible parties. In numerous cases, however, district courts interpreted the statute particularly the §107 provisions outlining the liabilities and defenses of persons against whom the Government may assert claims-to impliedly authorize such a cause of action.
>
> The 1986 SARA amendments included a provision-CERCLA § 113(f) that expressly created a cause of action for contribution ....Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.

Id., at 1965 (footnote omitted) (emphasis added). In referring to the similarity and overlap between CERCLA §§ 107 and 113, the *Key Tronic* Court indicated that both provisions authorize responsible parties to bring contribution claims.[11] Nothing in *Key Tronic* suggests that such parties previously had a right to bring CERCLA § 107 actions to impose joint and several liability. *See also Key Tronic*, 114 S. Ct. at 1966

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[11] *See infra*, part IIA (explaining that a contribution act(on arises under CERCLA § 107 but is governed by CERCLA § 113). Plaintiffs' citation to *Kev Tronic* for the proposition that "§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs," Br, at 32 omits the explanatory footnote that such action lies in contribution. *Key Tronic*, 114 S. Ct. at 1966.

n.11 (reiterating that the implied private right of action in CERCLA § 107 was for contribution).

The fact that plaintiffs are undisputed PRPs, but have not formally admitted liability or otherwise been adjudicated liable, does not remove this action from the confines of contribution. For example, in CER II, the Tenth Circuit, relying on the Restatement (Second) of Torts stated, "There is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution." 50 F.3d at 1535. (emphasis added). *See also*, *Rumpke*, 107 F.3d at 1241 (PRP who cannot plead innocence limited to contribution claim); *Redwing Carriers*, 94 F.3d at 1513 ("Parties who are not themselves liable or potentially liable for response costs under § 107(a) of CERCLA can bring a cost recovery action directly under § 107(a) . . . ."); *Akzo Coatings, Inc.*, 30 F.2d at 763-64 (PRP cleaning. up site pursuant to consent decree limited to contribution claim).

District courts agree. *See Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947.F. Supp. 790, 800 (D. N.J. 1996) (non-innocent party cleaning up pursuant to a consent order may not proceed with an action solely under CERCLA § 107(a)); *Sun Co., Inc, v. Browning-Ferris, Inc.*, 919 F. Supp. 1523, 1530 (N.D. Ok. 1996) (PRPs cleaning up pursuant to EPA § 106 Order limited to action in contribution); *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 679-81 (S.D. N.Y. 1996) (PRP cleaning up site pursuant to a consent order limited to contribution claim); *Plaskon*, 904 F. Supp. at 652 ("Whether it admits 107(a) Liability is irrelevant; as the current owner, [plaintiff] is a PRP pursuant to § 107(a)(1)); *Darton*, 904 F. Supp at 652 ("whether it admits § 107(x) liability is irrelevant"); *Ekotek Site PRP Comm. v Self*, 881 F. Supp. 1516, 1521 (D. Utah 1995) (It is "the plaintiff's status as a 13 PR P, and not the

degree of voluntariness with which it initiated cleanup activity or the settling status of other PRPs, which is controlling . . . ."); *United States v. Bay Area Battery*, 895 F. Supp. 1524, 153 (D. Fla. 1995)(cleaning up site pursuant to consent decree limited plaintiffs to a contribution action); *Kaufman & Broad-South Bay v. Unisys Cam.*, 868 F. Supp. 1212, 1214-15 (N.D. Cal. 1994)(PRP who cannot demonstrate innocence limited to contribution action); *Ciba-Geigy Corp. v. Sandoz Ltd.*, No. 92-491, 1993 WL 668325, *5 (D. N.J. 1993)(reasoning that there would have been no need for CERCLA § 113 if PRPs could already recover full response costs under CERCLA § 107); *Transtech Indus., Inc. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1086 (D. N.J. 1992)("Absent a statutory provision to the contrary, a claim against one liable party by a party who voluntary [sic] agreed to perform certain actions pursuant to a settlement agreement is still a claim for contribution."), appeal dismissed, 5 F.3d 51 (3d Cit. 1993), *cent, denied*, 114 S. Ct. 2692; *Avnet, Inc. v. Allied-Signal, Inc.*, 825 F. Supp 1132, 1138 (D. R.I. 1992)("Under CERCLA, when one PRP sues another to recover a share of the response costs incurred by the first, that suit is a claim for contribution. ").

II. ONLY INNOCENT INJURED PARTIES MAY CLAIM THE BENEFITS OF JOINT AND SEVERAL LIABILITY

A. CERCLA Sections 1•7(a) and 113(f) Do Not Provide Separate Causes of Action for a PRP Seeking Cost Recovery.

In this action, the other defendants, the plaintiffs and the district court are of the view that CERCLA §§ 107(a) and 113(f) provide separate and distinct causes of action, and that a claim for contribution is based exclusively upon CERCLA § 113(f). The United States believes, however, that actions that sound in contribution must be brought pursuant to

CERCLA § 107(a) as governed by CERCLA § 113(f).[12] The statute and its legislative history, case law, common law and public policy support this position that an action in contribution must also be brought in the context of a CERCLA § 107 action.

This view, is supported by the plain language of the statute:

> Any person may seek contribution from any other person who is liable or potentially liable under section f 1071(a) of this title.

42 U.S.C. § 9613(f)(1)(emphasis added).[13] Only CERCLA § 107 provides the basis and the elements of a claim for recovery of "necessary costs of response," and lists the parties who are liable. 42 U.S.C. § 9607(a). Similarly, CERCLA § 107(b), 42 U.S.C. § 9607(b), provides the only defenses to liability.

The view that CERCLA § 113 applies to claims asserted under CERCLA § 107 is also supported by the legislative history of SARA, the law that added CERCLA § 113(f) to

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[12] It is for this reason that the United States has elected to file its own brief.

[13] S,gg g]w other provisions of CERCLA § 113 that apply to to claims asserted under CERCLA § 107, gX,, the jurisdiction provisions of CERCLA §§ 113(a) and (b), and the statute of limitations in CERCLA § 113(g), 42 U.S.C,§§ 9613(a), (b) and (g). As the House Judiciary Committee explained, CERCLA § 113 generally is the repository of "a number of administrative or judicial procedures applicable to Superfund decision-making and litigation" and therefore was considered an appropriate provision in which to "clarify the availability of judicial review regarding contribution claims." H.R. Rep. No. 253, 99"' Cong., 1st Sess., pt. 3 at 18-19 (1985).

the statute. CERCLA § 113(f) was added by SARA to the statute for the express purpose of clarifying that liable parties could seek relief from each other under CERCLA 8 107. *See*, H.R. Rep. No. 253, 99" Cong., 1st Sess., pt, 3 at 18-19 (1985), *reprinted in* 1986 U.S. Code Cong. and Admin. News 3041-3043 (CERCLA § 113(f) "clarifies the availability of judicial review regarding contribution claims and settlements")(emphasis added); S. Rep. No. 11, 99th Cong., 1st Sess. 43 (1985xthe bill "clarifies and confirms existing law" by adding a contribution provision)(emphasis added); 131 Cong. Rec. 24450 (1985) (statement of Sen. Stafford, the sponsor of S.51)[14] (amendment of the statute would "remove any doubt as to the right of contribution ... despite several recent district court cases correctly confirming that we intended the law to confer such a right")(emphasis added). Clarification was needed because judicial decisions prior to SARA reached inconsistent rulings on whether liable parties could sue each other under CERCLA § 107.[15]

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[14] S.51 and H.R. 2817 were the Senate and House bills, respectively, that were reconciled by a Conference Committee of the House and Senate and ultimately became SARA. S.51 had originally placed the contribution provisions within CERCLA § 107. See S.51, 99'" Cong., 1st Sess.,131 Cong. Rec. 24450 (1985). The provision was ultimately enacted in CERCLA § 113 because that is where it was in the House bill that became SARA. See H.R. 2817, 99th Cong., 1st Sess., 131 Cong. Rec. 34645 (1985).

[15] *See, e.g., City of New York v. Exxon*, 633 F. Supp. 609, 615 (S.D. N.Y. 1986), *United States v. New Castle County*, 642 F. Supp. 1258, 1269 (D. Del. 1986), *State of Colorado v. Asarco. Inc.*, 608 F. Supp. 1484, 1490 (D. Colo. 1985), *Jones v. Inmont*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984), *United State v. Ward*, 14 Envtl. L. Rep. 20,804, 20,806 (E.D. N.C.

Thus, Congress was clear that in enacting CERCLA § 113(f) it was only confirming and clarifying an existing cause of action for contribution under CERCLA § 107. Congress did not indicate in any way in the statute or in the legislative history that CERCLA § 113(f) was intended to be entirely separate and distinct from the CERCLA § 107 cost recovery, action. *County Line Investment Company,* 933 F.2d at 1516-17 ("section 107(a) must be the source of any right to contribution").

In *Dant & Russell*, the Ninth Circuit specifically held that CERCLA § 113(f) applied to a CERCLA § 107(a) cost recovery action that sounded in contribution. 951 F.2d at 249. In *Control Data Corp.*, the Eighth Circuit explained this principle in the context of private party actions:

> Under CERCLA; if a responsible party, as defined by subsections (1) through(4), releases hazardous materials into the environment, and that release 'causes the incurrence of response costs,' then the party is liable. 42 U.S.C. § 9607(a). The question then becomes, liable: for what? CERCLA's answer is that the party is liable .for 'any other necessary cost of response incurred by any other person consistent with the national contingency plan.' 42 U.S.C. § 9607(a)(4)(B) (emphasis added). Thus a plain reading of the statute leads us to the conclusion that once a party is liable, it is liable for its share, as determined by Section 9613(f), of 'any' and all response costs, not just those costs 'caused' by its release.

53 F.3d at 936. (footnote omitted). *Accord*, *County Line Investment Company v. Tinney*, 933 F.2d 1508, 1516-17 (10th

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1984), *City of Philadelphia v. Stephan Chemical Co.*, 544 F. Supp. 1135., 1140 (E.D. Pa. 1982).

Cir. 1991) (CERCLA § 113 should not be read in isolation from CERCLA § 107; contribution claims pleaded under CERCLA § 113(f)(1) held subject to the requirement of CERCLA § 107 that costs sought to be recovered be "consistent with the National Contingency Plan"). *See also Bancamerica*, 100 F.3d 792 (where court similarly held that plaintiffs who sued for contribution under CERCLA § 113(f) were entitled to prejudgment interest as provided in CERCLA § X07(a)); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1988) (explaining that defenses under CERCLA § 107 apply to contribution actions).

Many district courts agree that CERCLA §§ 107(a) and 113(f) must be read together. *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D. N.Y. 1996) ("Section 107(a)(4)(B) must be read in conjunction with other sections of CERCLA, namely,§ 113(f) and its legislative history"). *E.g., Reynolds Metals Co. v. Arkansas Power & Light Co.*, 920 F. Supp. 991, 995 (E.D. Ark. 1996) ("[W]hile the PRP's liability will initially be predicated upon § 107(a) . . its ultimate liability . . . will be limited by the equitable share requirement of § 113(f)"); *Bay Area Battery*, 895 F. Supp. at 1533; *Transtech Indus., Inc.*, 798 F. Supp. at 1086; *Kelley v. Thomas*, 790 F. Supp. 710, 717-19 (W.D. Mi. 1990) (allowing a liable party to proceed under CERCLA § 107 but requiring apportionment under CERCLA § 113); *PVO Int'l Inc. v Drew Chemical Corp.*, No. 87-3921, 19 ELR 20077, 20080 (D.N.J. 1988) (concluding that "[S]ection 107(a) should be read in conjunction with the contribution provision in section 113(f)(1), which does provide for allocation of response costs [among liable parties]").

While some district courts have permitted CERCLA § 107 claims by potentially liable patties for joint and several liability, those courts misunderstand the statutory basis for contribution actions. *See Adhesives Research Ins, v.*

American Inks & Coatings Corp., 931 F., Supp. 1231, 1242 (M.D. Pa. 1996) (although allowing a PRP CERCLA § 107 cost recovery action to proceed, the court recognized that the majority of courts have permitted PRPs to only bring a contribution action subject to CERCLA § 113(f)); *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400 (D. Az. 1996) (court did not limit PRPs to action in contribution)[16]; *Charter Township of Oshtemo v. American Cyanamid Co.*, 910 F. Supp. 332 (W.D. Mi. 1995) (a liable patty can bring a CERCLA § 107 joint and several liability action); *Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159 (W.D. Ky. 1995) (a liable or potentially liable party can bring a CERCLA § 107 action for joint and several liability).[17]

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[16] This case is currently the subject of an interlocutory appeal in the Ninth Circuit.

[17] Cases rejecting joint and several liability for claims by liable parties are legion: *e.g.*, Stearns & Foster *Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 800 (D. N.J. 1996) (a non-innocent party may not proceed with a joint and several liability CERCLA § 107(a)' action); *Reynolds Metals Co. v. Arkansas Power and Light Co.*, 920 F. Supp. 991, 994-5 (E.D. Ak. 1996) (PRP only may pursue several liability by a claim for contribution); *Plaskon*, 904 F. Supp. at 652 (PRP defendants may only be held liable for their individual, several and equitable share of responsibility of recoverable costs); *Tesa Tuc*, 919 F. Supp. 662, 679-81 (S.D. N.Y. 1996); *Gould Inc. v. A & M Tire Service*, 901 F. Supp. 906, 913 (M.D. Pa. 1995)(liability in action by party entering into consent agreement with EPA is several only); *City of Fresno v. NL Indus. Inc.*, No. 93-5091, 1995 WL 641983 (E.D. Cal. July 9, 1995)(joint and several liability unavailable in action between PRPs); *T H Agric. & Nutrition v. Aceto Chemical Co.*, 884 F. Supp. 357, 361-62 (E.D. Cal.

These district courts have all assumed, without explanation, that claims under CERCLA §§ 107 and 113 are separate and distinct, the former necessarily giving and several liability under the case law and the latter giving rise to equitable apportionment. *Pinal Creek*, 926 F. Supp. at 1403; *Barmet*, 914 F. Supp. at 163-4; *Oshtemo*, 910 F. Supp. at 335. Because CERCLA § 107 provides for a claim "by any person," these courts reason that a CERCLA § 107 cost recovery action and appendant joint and several liability are available even to responsible parties.[18] E.g., Adhesives search, 931 F. Supp. at 1238; Pinal Creek, 926 F. Supp. at 1405; Barnet, 914 F. Supp. at 164; , 910 F. Supp. at 337-38. On this purportedly straightforward plain language statutory analysis, these courts have misapplied the entire common law doctrine of joint and several liability - as if it were expressly written into CERCLA § 107(a). While a CERCLA § 107 action tray be maintained by "any person," CERCLA § 113(f)(1) mandates unequivocally that all actions that sound in contribution "shall be brought in accordance with this section." (Emphasis added). Accordingly, there is no separate CERCLA § 107 action available to CERCLA responsible parties that somehow imports the common law doctrine of joint and several liability.

1995)(stating that disallowing joint and several liability in suit between PRPs simplifies litigation); *Kaufman and Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212, 1214 (N.D. Cal. 1994) (liability in suit by non-innocent party is merely several).

[18] This reasoning ignores the Supreme Court's teaching in *Key Tronic Corp.*, 114 S. Ct. at 1965, that remedies other than joint and several liability, are available in CERCLA § 107 actions.

B. Under the Law, a Private Party, must Plead and Prove Innocence to Maintain an Action for Joint and Several Liability.

Unlike claims giving rise to joint and several liability, the very goal of an action for contribution is the equitable allocation of liability among joint tortfeasors. See generally Stuart Speiser, et al., THE AMERICAN LAW OF TORTS § 3.15 (1983 & Supp: 1995); William A. Prosser, HANDBOOK OF THE LAW OF TORTS § 47 (1964). The Supreme Court has explained:

> Typically, a right to contribution is recognized where two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of common liability. Recognition of the right reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will escape liability.

Northwest Airlines, Inc. v. Transport Worker Union, 451 U.S. 77, 101 S. Ct. 1571, 1578, 67 L.Ed:2d 750, 760, 761 (1981). Joint and several liability, to the contrary, renders each defendant liable for the entire harm. *Restatement (Second) of Torts* § 875 (1979). Because joint and several liability would render one defendant liable for the share of response costs attributable to the other defendants, it is unavailable in contribution actions. Tesa Tuck, 919 F. Supp at 680-81. The Restatement (Second) of Torts § 886A specifies, "No tortfeasor can be required to make contribution beyond his own equitable share of the liability.[19]

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[19] Accordingly, even district courts that have allowed PRPs to proceed with non-contribution claims under CERCLA §

CERCLA does not specifically provide for joint and several liability. Rather, Congress left that issue to be determined by the courts using principles developed under the common law. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268-69 (3d Cir. 1992); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). *See generally* Patrick S. Martin, *The Legacy of Chem-Dyne: Searching for Equity in CERCLA Cost-Recovery Actions*, 25 Tex. Tech L. Rev. 909, 914-17 (1994)(analyzing the legislative history). Following guidance in the legislative history, courts have uniformly relied upon the Restatement (Second of Torts for guidance in defining the scope of common law on joint and several liability. *United States v. Rohm & Haas*, 2 F.3d 1265 , 1280 (3d Cir. 1993); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889 (5th Cir. 1993); *United States v. Monsanto Co.*, 858 F.2d 160', 171-72 (4th Cit. 1988), *cert. denied*, 490 U.S. 1106 (1989).. The Restatement provides:

> Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.

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107 acknowledge that contribution actions do not give rise to joint and several liability. *E.g.*, *The Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1994); *Allied Corp. v. Acme Solvents Reclaiming*, 691 F. Supp. 1100, 1118 (N.D. III. 1988). The age old common law rule against contribution actions amongst joint tortfeasors has been steadily eroded through time-by statute and the case law. Speiser, *supra*, at § 3:15. It would be nonsensical, however, to take the additional step of allowing joint and several liability among joint tortfeasors.

Restatement (Second) of Torts § 875 (1979).[20]

Relying on the Restatement rule, courts have systematically held defendants severally liability in non-contribution CERCLA § 107(a) actions on behalf of the government (the "injured party"). *See O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), *cert. denied sub nom American Cyanamid Co. v. O'Neil*, 493 U.S. 1071 (1990); *United States v Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). This rule is critical to enabling the United States to compel responsible parties to clean up CERCLA sites and to obtain full cost recovery of EPA's Superfund expenditures from the responsible parties.[21]

However, when suit is brought by one of the responsible parties, rather than the government or another innocent, "injured" patty, the action implicates CERCLA § 113 as well because it is an action for contribution, to which joint and several liability is inapplicable. Indeed, the very purpose of imposing joint and several liability - to promptly make the innocent, injured victim whole in the face of indivisible harm

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[20] See also, Speiser, et al., supra, at § 3:6 ("Notwithstanding the usual lack of sweeping agreement, it may be safely stated that 'joint' tortfeasors are jointly and severally liable in American law and that the injured or aggrieved party has an option or election whether to treat the tort as 'joint' or 'several,'").

[21] The court stated that "[t]he legislative history of the Superfund Amendments of 1986 (which enacted section 113) makes clear that the United States may bring either a section 106 or 107 action, regardless of whether the United States itself was a generator of waste at the site . . . ." United States v. Kramer, 757 F. Supp. 397, 415 (D. N.J. 1991) (citing H.R.Rep. No. 253(I). 99th Cong., 2nd Sess. 1, 79-80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861-62).

- disappears. Many courts have recognized these important principles in the CERCLA context. Most recently, the Seventh Circuit allowed a non-contribution claim under CERCLA § 107 to proceed where a landowner alleged that it did not contribute to polluting a Superfund site. *Rumpke* 107 F.3d at 1241. However, the court warned that if the evidence showed that the plaintiff was not innocent, as alleged, it would be restricted to an action in contribution. *Id.* The court stated that "when two parties who both injured the property have a dispute about who pays how much-a derivative liability, apportionment dispute-the statute directs them to § 113(f) and only to § 113(f)." *Id.* at 1240 (emphasis added).[22] The Eleventh Circuit recently stated, "to bring a cost recovery action based solely in § 107(a), [plaintiff] would have to be an innocent party." *Redwing Carriers*, 94 F.3d at 1496.

Similarly, the First Circuit acknowledged that CERCLA

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[22] Defenses to liability in Superfund are affirmative, so a PRP will bear the burden of proving that it fits within one of the defenses. *Velsicol*, 9 F.3d at 530 ("By its terms. . . section 107 liability is only barred by a limited number of enumerated causation-based affirmative defenses . . . . [t]he plain language of section 107(b) [sets] forth the universe of [those] defenses. . ."). To the extent *Rumpke* suggests that these defenses are broadened for the purposes of bringing CERCLA § 107 actions, it is inconsistent with CERCLA and case law. *See*, *Redwing Carriers*, 94 F.3d at 1507 (stating "[p]ersons who are responsible under § 107(a) may escape CERCLA liability if they can prove one of three affirmative defenses set forth in CERCLA § 107(b)); *New York v. Lashins Arcade Co.*, 91 F.3d 353, 359 (2d Cir. 1996) (stating that a responsible party may be held strictly liable for response costs "unless it can satisfy one of CERCLA's affirmative defenses" in CERCLA § 107(b)).

imposes joint and several liability for the reimbursement of government expenses while limiting "non-innocent" PRPs to seeking the recoupment of only those expenditures exceeding their overall liability. *Browning-Ferris Indus.*, 33 F.3d at 100. Additionally, the Seventh Circuit, in rejecting the plaintiff's argument that it could bring a "direct" action[23] under CERCLA § 107(a) stated:

> [Plaintiff] has experienced *no injury* of the kind that would typically give rise 2YBy "direct action," the Court was apparently indicating a non-contribution action under CERCLA § 107(a) - to a direct claim under section 107(a) - it is not, for example, a landowner forced to clean up hazardous materials that a third, party spilled onto its property or that migrated there from adjacent lands. Instead, [plaintiff] itself is a liable party in some measure for the contamination . . . and the gist of its claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible.

Akzo Coatings, 30 F.3d at 764. A person that is innocent under one of the very limited defenses under CERCLA § 107(b) would similarly be entitled to a non-contribution CERCLA § 107 action. *See Kaufman and Broad-South Bay*, 868 F. Supp. at 1216. *See also*, CERC II, 50 F.3d at 1534-36; *United Technologies*, 33 F.3d at 101-103; *Amoco Oil Co.*, 889 F.2d at 672.

Indeed, two district court cases in this Circuit have recognized this important distinction between innocent and non-innocent parties in the CERCLA context. For example, in *Dartron Corp.*, the district court stated: "Actions for full cost recovery under § 9607(a) may be brought by: (1)

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[23] By "direct action," the Court was apparently indicating a non-contribution action under CERCLA § 107.

federal or state governments; or (2) 'innocent' private parties." *Dartron Corp.*, 917 F. Supp. at 1182. The court went on to explain that because the plaintiff did not fit within one of CERCLA's affirmative defenses, it "is not an innocent private party and is limited to an action in contribution." *Id.* *See also*, *Plaskon*, 904 F. Supp. at 651-52 (explaining that the linchpin of the analysis is whether a party is innocent). *See also Stearns*, 947 F. Supp. at 801 (stating "I conclude that [the plaintiff] may not proceed with an action under Section 107(a) unless it can demonstrate that it is an 'innocent' party"); *Boyce v. Bumb*, 944 F. Supp. at 812 ("The Courts of Appeals have recognized that 'innocent' parties may bring cost recovery actions under § 9607(a)"). Here, plaintiffs have not, and cannot, plead that they are innocent parties. Accordingly, they cannot allege joint and several liability.

C. This Court Should Reject Plaintiffs' Novel and Inconsistent Proposals to Create Judicial Exceptions to the Contribution Rule for "Working PRPs" and 106 Order Recipients.

Citing one district court opinion in another Circuit,[24] plaintiffs propose that this Court adopt a "working PRP" exception to the contribution rule. Br. at 15-16. Plaintiffs argue that CERCLA § 107(a)(4)(B), in allowing private party actions to recover "costs of response incurred," differentiates between responding and non-responding parties and allows responding parties to bring independent CERCLA § 107 actions regardless of their liability. *Id.* This Court should reject this novel proposal.

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[24] *United States v. Taylor*, 909 F. Supp. 355 (M.D. N.C. 1995). The same misconstruction of the statute was adopted by the district court in *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400 (D. Az. 1996), which is currently subject to an interlocutory appeal.

CERCLA recognizes, of course, that a person can incur response costs (hereinafter "responding costs") either by conducting a cleanup[25] in the first instance or by compensating the government or other party pursuant to a settlement or judgment for funds expended in a cleanup (hereinafter "non-responding costs"). *See generally, Browning-Ferris*, 33 F.3d at 101 (denominating these terms "first instance" and "reimbursement" costs). In *Browning-Ferris*, the First Circuit rejected as a "sleight of hand" the identical argument asserted by plaintiffs here that responding costs are recoverable in a CERCLA § 107 joint and several liability action, while non-responding costs are recoverable in contribution only. *Id.* at 101-02. The First Circuit explained that the language of CERCLA § 107(a)(4)(B) is too broad to support such an interpretation and that the interpretation would fail the "commonsense test" for two reasons. *Id.* at 102. The court explained:

> First, 42 U.S.C. § 9613 itself appears to reject any distinction for the purposes of contribution between first-instance costs and reimbursed costs. After all subsection 9613(f)(3)(B) authorizes a party to seek contribution for "some or all of the response action or for some or all of the costs of such action . . ." The simple reading of this subsection is that the initial phrase refers to expenses incurred in the course of liable party's direction of a site's cleanup while the second phrase refers to reimbursement of cleanup costs incurred under the government's hegemony.

Id.

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[25] The parameters of "necessary costs" are actually broader than actual cleanup costs. *See generally Key Tronic Corp.*, 114 S. Ct. 1960.

Second, the court explained that such an interpretation "emasculates the contribution protection component of CERCLA's settlement framework." *Id.* at 103. *See also Browning-Ferris Indus.*, 33 F.3d at 103 (the "mechanism for encouraging settlement would be gutted" by allowing a separate action under § 107); *Akzo Coatings, Inc.*, 30 F.3d 761. This is because a ruling that CERCLA §§ 107 and 113(f) provide separate and independent claims for relief would significantly undercut the incentive for responsible parties to settle with the government provided by the contribution protection provision of CERCLA § 113(f)(2), by potentially allowing non-settling PRPs to "end run" that provision simply by asserting their claim under CERCLA § 107. *See Tesa Tuck*, 919 F. Supp. at 681 ("contribution bar would be rendered meaningless"). The practical effect of this position would be to eliminate the finality Congress intended CERCLA § 113(f)(2) to bring to the CERCLA settlement process and therefore defeat the statutory intent of encouraging settlement. While courts have generally disallowed, such a strategy, this Court should use this opportunity to clarify the law in this area. *E.g., Rumpke*, 107 F.3d at 1239 (explaining that contribution ban would not apply if plaintiff could proceed under CERCLA § 107(a)); *United States v. Cannons Engineering*, 899 F.2d 79, 92 (1st Cir. 1990) (holding CERCLA § 113(f)(2) applicable to non-settlers' claim styled as "indemnification"). *Accord, United States v Pretty Products, Inc.*, 780 F. Supp. 1488, 1496 (S.D. Ohio 1991) (non-settling liable parties cannot avoid effect of CERCLA § 113(f)(2) by denominating their claims as "restitution"), and *United States v. U.T. Alexander*, 771 F. Supp. 830, 840-841 (S.D. Tex. 1991), *vacated and remanded* (on sanctions issue). No. 92-7038 (5th Cir. Jan. 21, 1993)(CERCLA § 113(t)(2) cannot be avoided by asserting claims for relief under state law).

Plaintiffs also assert that a comparison of the statutes of

limitations for claims for cost recovery and contribution actions "reinforces" its conclusion. Br. at 30. Specifically, they argue that the statute of limitations for contribution claims, CERCLA § 113(g)(3), provides four triggering events, none of which is the issuance of a CERCLA § 106 order.[26] Accordingly, they assert that Congress must have intended to allow them a non-contribution CERCLA § 107 claim. This analysis is flawed.

Based upon this limited situation in *which one* of the four triggers does not explicitly apply, plaintiffs would read CERCLA § 113(g)(3) out of the statute entirely (Br. at 29-30). This is because under their analysis, PRP's could proceed with a non-contribution CERCLA § 107 action, to which a different statute of limitations applies. CERCLA § 113(g)(2). This result would be "untenable" in light of a court's responsibility "to give effect to each subsection contained in a statute, indeed, to give effect to each word and phrase." *Browning-Ferris Indus.*, 33 F.3d at 101 (*citing United States v. Nordic Village*, 112 S. Ct. 1011, 1015 (1992)); *Tesa Tuck*, 919 F. Supp. at 681 ("the three year statute of limitations would be eviscerated"); *Boyce v. Bumb*, 944 F. Supp. at 809 (rejecting a similar statute of limitations argument).

Plaintiffs also suggest that this Court adopt a very specific exception to cover cases involving CERCLA § 106 Orders. Br. at 25. Specifically, they argue that CERCLA § 113(f) only permits a contribution action to be brought

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[26] The four "triggers" are: (1) an administrative settlement under CERCLA Section 122(g); (2) an administrative settlement under Section 122(h); (3) a judgment under CERCLA; or (4) a judicially approved consent decree. CERCLA § 113(g)(3). It is important to note as well that some of these four events, such as judicially approved consent decrees, often implicate "responding costs."

"during or following any civil action under section [106] . . . or under section -[107]." Because a CERCLA § 106 Order is not a "civil action", plaintiffs argue, their contribution action is barred and their only avenue of relief is a CERCLA § 107 cost recovery action alleging joint and several liability.[27] Br. at 22-26. This Court should reject this novel proposal as well.

At the outset, it is notable' that plaintiffs' argument here is inconsistent with the "working PRP" argument, for had Congress intended a "working PRP" exception, under this analysis the contribution provision should have barred all claims relating to responding costs. However, CERCLA § 113(f) specifically authorizes contribution claims in cases involving injunctive relief. Moreover, the argument is inconsistent with the plain language, the legislative history and common sense.

The plain language of CERCLA § 113(f)(1) is not restrictive, i.e., it does not say that a contribution action may only be brought during or following a civil action under CERCLA § 106. More importantly, CERCLA § 113(f)(1) specifically states that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] . . . or section 107." (Emphasis added).[28] Thus the

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[27] Nowhere do plaintiffs explain why they cannot bring a CERCLA § 107 action that alleges several liability only.

[28] The Seventh Circuit has broadly read the term "civil action" in this context, to include administrative orders, stating:

> Rumpke pointed out in both its brief and at oral argument that it is not subject to an administrative cleanup order . . . .Thus, Rumpke is not a party that is now or ever has been subject to a civil action under CERCLA § 106.

Rumpke, 107 F.3d at 1239.

contribution action is allowed by the very terms of the statute.[29]

Additionally, as plaintiffs correctly point out, the legislative history makes clear that the intent of this provision was to clarify and confirm the common law. Br. at 24. As explained above, the linchpin of the analysis under the common law is whether a party is liable or innocent. Plaintiffs' proposed construction therefore would not only read out the last sentence of CERCLA § 113(t)(1), but it would also dramatically alter the common law by requiring liable parties to bring joint and several liability actions and barring their actions in contribution. Constructions rendering absurd results are disfavored.[30] Saxion v. Titan-C-Manufacturing, Inc., 86 F.3d 553, 559 (6th Cir. 1996) (noting that courts "should avoid an interpretation of a statute that would lead to absurd or unreasonable results").

Similarly, the plain language in CERCLA § 113(t)(1) allowing contribution actions to proceed even in the absence of an underlying civil action squarely contravenes plaintiffs'

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[29] Moreover, because plaintiffs' action arises under CERCLA § 107 in the first instance, *see infra* pp.14-20, the contribution action is itself "during" a CERCLA § 107 action.

[30] Plaintiffs' argument also ignores the Supreme Court statement that CERCLA "authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." *Key Tronic*, 114 S. Ct. at, 1966. Thus, assuming arguendo that their claims were barred by CERCLA § 113(f)(1), it would still be permitted under the Supreme Court's reading of the statute.

argument that a settlement or judgment is a necessary prerequisite under CERCLA to bringing an action in contribution. Br. at 26-28. Indeed, this Court has made clear that an actual judgment or settlement is not required to bring an action for contribution. Rather, "payment in full by one of the co-obligors of a valid obligation of both obligors gives rise to the right of contribution against the one not participating in the payment." *Huggins v. Graves*, 337 F.2d 486, 489 (6th Cit. 1964) (judgment not required to seek contribution under the common law). Because a § 106 Order is a valid obligation,[31] plaintiffs' contribution action has accrued. *Kohr v. Allegheny Airlines, Inc.*, 586 F.2d 53, 56 (7th Cir. 1978) (*citing Huggins* and stating that one of the basic elements of a common law contribution action is that both parties be under a common obligation); *Dant & Russell*, 951 F.2d at 248-49(requiring equitable allocation even where cleanup was not pursuant to settlement, or judgment or "EPA arm-twisting"); *Akzo*, 30 F.3d at 764 (party cleaning up pursuant to CERCLA § 106 Order limited to action in contribution); *Amoco Oil Co.*, 889 F.2d at 672 (court restricted a site owner voluntarily cleaning up to a contribution action.); *Sun Co., Inc, Browning-Ferris. Inc.*,

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[31] A CERCLA § 106 order is such a legal obligation or responsibility, as failure to comply without "sufficient cause" subjects a person to $25,000 per day in fines and treble damages for the cleanup. CERCLA §§ 106(6), 107(c)(3). Plaintiffs have never contested their liability under the § 106 Order. A party who believes a § 106 order is invalid may respond by refusing to comply for "sufficient cause" or by obeying the order and then suing "for the return of its expenses on the ground that it was not a responsible party within the meaning of the statute after all." *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995) (citing CERCLA § 106(6)).

919 F. Supp. 1523, 1530 (N.D. Ok. 1996) (PRPs cleaning up pursuant to EPA § 106 Order limited to action in contribution).

Because CERCLA § 106 orders generally do not involve settlements or judgments. Therefore, a settlement or judgment requirement as a prerequisite to a CERCLA § 106 Administrative Order recipient's contribution action would lead to the absurd result of requiring many liable parties to proceed on a non-contribution basis.

III. POLICY CONSIDERATIONS FAVOR LIMITING PRPS TO ACTIONS IN CONTRIBUTION.

As a policy matter, limiting responsible parties to bringing contribution claims makes sense. First, it would halt the ancillary litigation and third-, fourth-, and fifth-party practice that bogs down CERCLA litigation. *T H Agriculture & Nutrition Co.*, 884 F. Supp. 375, 361 (E.D. Cal. 1995) (allowing responsible parties to bring a non-contribution CERCLA § 107 action "guarantees inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case"). One court recently explained that "reducing this sort of sequential, piecemeal litigation will further the goals underpinning CERCLA by making cases more manageable, reducing transaction costs and enabling courts to perform CERCLA allocations of , liability more efficiently." *Tesa Tuck*, 919 F. Supp. at 681. *E.g., Interstate Power Co, v. Kansas City Power & Light Co.*, 992,F.2d 804, 806 (8th Cir. 1993) (fourth-party action); *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309, 1314 (D.N.J. 1992) (fourth- and fifth-party actions); H.R.Rep. No. 253, 99th Cong., 2nd Sess. part 1, 80 (1985), reprinted in1986 U.S. Code Cong. & Admin. News 2835, 2862.

Moreover, this added efficiency does not substantially burden private plaintiffs in CERCLA cases. After incurring

response costs in excess of its allocable share or agreeing with the federal or state government to pay more than its allocable share, a responsible party may sue as many other PRPs for contribution as it deems worth pursuing: The costs of "work performed in identifying other potentially responsible parties" is recoverable. *Key Tronic*, 114 S. Ct. at 1967. The PRPs ultimately joined as defendants will pay their allocable share of the costs and, facing liability only for their allocable share, will accordingly have no need to sue others for contribution.[32] Nor does the rule limiting

[32] Contrary to the district court's Memorandum at 6, a liable party does not have to prove divisibility of the harm in order to be entitled to equitable allocation under CERCLA § 113(f). *Redwing Carriers*, 94 F.3d at 1513. *See also, In re Hemingway Transport Ins.*, 993 F.2d 915, 921 n.4 (1st Cir. 1993). Indeed, if the harm were divisible in the first place, there would be no joint obligation to allocate among joint tortfeasors. Rather, the party seeking allocation only has the burden of showing that allocation is appropriate. *Environmental Transportation Systems. Ins. v. Ensco, Inc.* , 969 F.2d 503, 508 (7th Cir. 1992). In allocating liability, courts' generally consider, several equitable factors proposed as part of an amendment to the original CERCLA bill by then Representative Albert Gore of Tennessee. *See In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 900 (5th Cir. 1993). These factors are (i) whether a party's contribution to the release of hazardous wastes can be distinguished from the contributions of other parties; (ii) the volume of hazardous waste involved; (iii) the degree of toxicity; (iv) the extent of the party's actual involvement in waste generation, storage, or disposal; (v) the degree of care exercised by the party; and. (vi) the degree of cooperation with environmental officials. 126 Cong. Rec. 26,779, 26,781 (1980). *See also* H.R. Rep. No. 253 (III), 99th Cong., 1st Sess. 19 (1985). The courts have relied heavily on these factors. *See e.g., Environmental Transp. Sys., Inc. v. ENSCO, Inc.* , 969 F.2d 503, 508 (7th Cir. 1992); *Amoco Oil Co. v. Borden, Ins.*, 889 F.2d 664, 672-73 (5th Cir. 1989); *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 86 (D. Me. 1988), *aff'd sub nom., Travelers Indem. Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989); United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1910 (C.D. Cal. 1984); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). Other factors are often considered as well. *E.g., United States v. R.W. Meyers, Inc.*, 932 F.2d 568, 571, 572 (6th Cir. 1991) (stating that the court may consider "any factor it deems is in the interest of justice"); In re *Dant & Russell, Inc.*, 951 F.2d at 249 (upholding the allocation of 50% of the response costs to the lessee of an industrial site based principally on the relative length of its involvement with the site).

responsible parties to contribution claims broaden the defenses against PRPs. See *Environmental Transportation Systems v. ENSCO, Inc.*, 969 F.2d 503, 506-07 (7th Cir. 1992).[33]

As discussed above at pp.26-27, this approach encourages settlement by not allowing parties to "end run" contribution protection. In some situations, allowing a liable party to obtain "full, recovery" or joint and several liability under CFRCLA § 107 could result in a total escape from liability for some responsible parties. A responsible party that has resolved its liability with the government is entitled to contribution protection from other parties. 42 U.S.C. § 9613(f)(2). If the settling party were allowed to obtain "full

[33] The Third Circuit's discussion of "defenses in a broad sense" to include the statute of limitations and settlement protection in *Smith Land & Improvement Corp.*, 851 F.2d 86, is not inconsistent with the fact that defenses to liability under CERCLA § 107(b) are strictly limited.

recovery" or joint and several liability against the non-settling parties, the contribution protection bar would prevent the non-settling parties from countersuing -- resulting in a "windfall" for the settling party, who could end up paying nothing.

Nor would plaintiffs be saddled with the burden of "orphan shares." Br. at 20. In a contribution action, orphan shares should not be unfairly allocated to one party or another, but rather equitably apportioned by the district court pursuant to a number of factors. *Tesa Tuck,* 919 F. Supp. at 681 ("Courts can use the powers provided by § 113(f)(1) to allocate any 'orphan stares' among viable PRPs, with the result that each viable PRP's allocable share may include -a portion of whatever 'orphan shares' there are"); *Stearns*, 947 F. Supp. at 801 (stating "the danger that a PRP will be unable to recover the 'orphan shares,' absent Section 107's provision for joint and several liability, is a statutory 'paper tiger'"); *T H Agriculture and Nutrition*, 884 F. Supp. at 32; *City of Fresno*, 1995 WL 641983 at 4. Based upon equitable factors, any liable party could be responsible for all, part, or none of the orphan shares. *E.g., Gould, Inc.*, 901 F. Supp. at 913 (holding PRP plaintiff liable for all orphan shares based on the facts). *See generally* Prosser, *supra*, at § 48 ("In some instances . . . equity may require : . . that the share of a tortfeasor who is insolvent or absent from the jurisdiction be borne by others."); Uniform Comparative Fault Act § 2(d) (suggesting apportionment of insolvent shares).

Plaintiffs argue that the ability to assert claims for joint and several liability encourages voluntary cleanups and thus furthers the goals of CERCLA. Br. at 16.[34] However, it is unnecessary that private parties have the potent litigation

[34] It should be noted that plaintiffs did not "voluntarily" undertake cleanup efforts. They did not act until ordered to do so.

weapon of joint and several liability to encourage them to undertake "voluntary" cleanups. *See Stearns*, 947 F. Supp. at 801 ("The residual power granted to a district court in Section 113 to apportion liability according to equitable principles more than adequately protects a PRP who undertakes a clean-up of another party's toxic legacy"). Sufficient incentives already exist within the statutory scheme. First, a voluntary cleanup satisfies a responsible person's legal obligation, often allowing the continuation and improvement of business activities. Second, cleanups conducted by private parties are often much less expensive than those conducted by the government. Third, government oversight is reduced to a. minimum where parties initiate cleanups on their own. Fourth, the parties gain a significant litigation advantage in the allocation phase by presenting their cleanup efforts to the court as an equitable factor.35

Finally, it is important to note that a private party who does not initiate a cleanup "voluntarily" runs a grave risk of becoming the subject of an action for joint and several liability itself. Such a party would shoulder all of the same burdens as the liable party who "voluntarily" initiates a cleanup and subsequently seeks contribution. However, such a party would be at a significant disadvantage because it could not present to the court its "voluntary" cleanup efforts as one equitable factor.

In sum, the statutory scheme already provides sufficient incentives to encourage voluntary cleanups. The affirmation of the uniform rule in the circuit courts that a liable party is limited to an action for contribution would encourage early, efficient resolution of contribution claims, avoid piecemeal litigation, reduce transaction costs.

[35] One of the Gore factors, *supra* note 32, is the degree of cooperation with environmental officials.

CONCLUSION

For the foregoing reasons, the United States urges this Court to affirm the decision of the district court limiting plaintiffs to an action in contribution, and to clarify that actions in contribution arise under CERCLA § 107(a) and are governed by CERCLA § 113.

Respectfully submitted,

/s/

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DESIGNATION OF APPENDIX CONTENTS

The Defendants-Appellees Secretary of Defense, Secretary of Veterans Affairs, and Administrator of National Aeronautics and Space Administration, pursuant to Rule 11(b), hereby designate the following document to be included in the Joint Appendix for this matter:

Description of Item	Record Entry	Date
Exhibit A to Defendants' Motion for Summary Judgment Re: EPA Administrative Order	R.1008, Ex. A	11/14/94